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No. 98-——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

RENEE LOWERY, *et al.*,
Petitioners,

v.

CIRCUIT CITY STORES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case was brought and certified as an employment discrimination pattern or practice class action under Title VII and 42 U.S.C. § 1981 seeking systemic injunctive relief as well as back pay and a jury trial to determine compensatory and punitive damages for the individual class members. The Fourth Circuit reversed a unanimous jury verdict finding that respondent had engaged in an intentional pattern or practice of racial discrimination. The questions presented are:

1. Whether the court of appeals erred in foreclosing all procedural avenues by which victims of an intentional pattern or practice of racial discrimination may obtain both class-wide injunctive relief and monetary damages.

2. Whether a district court is precluded from granting systemic injunctive relief to remedy a pattern or practice of intentional racial discrimination found by the jury merely because the previously certified class action has been decertified solely for reasons of case management.

3. Whether the court of appeals violated this Court's ruling in *Bazemore v. Friday*, 478 U.S. 385 (1986), by holding statistical evidence of discrimination to be nonprobative because of a purported failure to control for one potential variable in a regression analysis.

4. Whether 42 U.S.C. § 1981 requires proof of conduct more egregious than intentional racial discrimination in order to permit the jury to consider an award of punitive damages, being substantially the same question that the Court granted certiorari to review in *Kolstad v. American Dental Ass'n*, No. 98-208 (Nov. 2, 1998).

LIST OF PARTIES

1. Renee Lowery, Lisa S. Peterson, Shelby McKnight, Gregory Fleming, Nadra Smith, Ponnette Smith, Sheila Smith, Patricia Spencer and Edward Stokes are petitioners in this Court and were plaintiffs in the district court and appellees and cross-appellants in the court of appeals.

2. Sonya Hairston and Dynelle Johnson were plaintiffs in the district court but were not parties in the court of appeals and are not petitioners in this Court.

3. Circuit City Stores, Inc. is the respondent in this Court and was the defendant in the district court and the appellant and cross-appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Renee Lowery, Lisa S. Peterson, Shelby McKnight, Gregory Fleming, Nadra Smith, Ponnette Smith, Sheila Smith, Patricia Spencer and Edward Stokes ("petitioners") hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit dated September 14, 1998.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-44a) is reported at 158 F.3d 742. The district court's June 25, 1997 opinion declining to stay the permanent injunction (App., *infra*, 46a-62a) is unreported. The district court's March 12, 1997 opinion denying Circuit City's post-verdict motion for judgment as a matter of law (App., *infra*, 63a-79a) is reported at 73 Fair Empl. Prac. Cas.

(BNA) 847. The district court's March 12, 1997 order entering a permanent injunction (App., *infra*, 80a-88a) is reported at 73 Fair Empl. Prac. Cas. (BNA) 841. The district court's March 12, 1997 opinion sustaining the jury's damage award (App., *infra*, 89a-103a) is reported at 73 Fair Empl. Prac. Cas. (BNA) 834. The district court's August 23, 1996 opinion decertifying the class (App., *infra*, 104a-111a) is reported at 168 F.R.D. 550. The district court's April 30, 1996 opinion certifying the class action (App., *infra*, 112a-124a) is reported at 70 Fair Empl. Prac. Cas. (BNA) 1681.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1998. (App., *infra*, 45a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Civil Rights Act of 1991, 42 U.S.C. § 1981a, and 42 U.S.C. § 1981. Pertinent portions of the statutes are reproduced in Appendix H, *infra*, 125a-134a.

STATEMENT OF THE CASE

A. Proceedings in the District Court

On December 2, 1996, at the conclusion of a month-long trial involving 68 witnesses and 1800 exhibits, a unanimous jury found that respondent Circuit City Stores, Inc. ("Circuit City") had engaged in an intentional pattern or practice of racial discrimination with regard to promotions at its corporate headquarters in Richmond, Virginia. The lawsuit leading to this verdict had been filed by the petitioners, nine present or former employees of Circuit City, as a class action under Fed. R. Civ. P. 23(b)(2) on behalf of approximately 1800 African Americans who were employed at company headquarters between April 19, 1992 and the date of trial. Petitioners alleged—and ultimately proved—that Circuit City had

intentionally erected a "glass ceiling" that prevented African Americans from obtaining promotions to supervisory or management positions. First Amended Complaint ¶¶ 17-18.[1]

On April 30, 1996, the district court granted petitioners' motion to certify the class under Rule 23(b)(2). Four months later, in response to petitioners' motion to bifurcate the case and adopt a two-stage trial plan similar to that recommended in the Manual for Complex Litigation,[2] the district court decided *sua sponte* to decertify the class on the grounds that "the class action procedure is not the best method of case management." (App. 109a) Instead, the court permitted petitioners to prove their individual claims and also to produce evidence of the pattern or practice of discrimination. If there was a finding of a pattern or practice, then Circuit City would "be collaterally estopped from denying the existence of such discrimination at subsequent trials." (App. 110a) Class members would be required to file individual suits, and the district court then might "choose to consolidate some of the subsequent suits and try them in bulk as it sees fit." (*Id.*) In a later opinion, the district court stressed that the class had been decertified "merely for case management purposes" and that the court had "never found that the class fails to satisfy any of the Rule 23 requirements." (App. 66a) Thus, in the district court's view, the decertification did not alter "the fact that a group of individuals who qualify for class treatment are entitled to class-wide relief." (*Id.*)

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[1] Petitioners alleged that Circuit City's conduct violated Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. The district court had jurisdiction by virtue of 42 U.S.C. § 2000e-5(f) and 28 U.S.C. §§ 1331 and 1343(a)(4). Petitioners sought permanent injunctive relief, back pay, compensatory and punitive damages, and an award of attorneys' fees and expenses. First Amended Complaint at 45.

[2] The details of the proposed trial plan are described in the district court's opinion at App. 104a-110a.

Before trial, the district court granted summary judgment dismissing the claims of petitioners Sheila Smith, Patricia Spencer and Nadra Smith. The court rejected petitioners' argument that they were entitled to the benefit of the *Teamsters* presumption and burden-shifting procedure because Circuit City's motion did not controvert the pattern or practice allegations in the complaint.[3] At the close of plaintiffs' case at trial, the court granted judgment as a matter of law against Ponnette Smith, Edward Stokes and Gregory Fleming. The district court again refused to give petitioners the benefit of the *Teamsters* presumption, even though the court recognized that petitioners had presented sufficient evidence to prove a pattern or practice of intentional racial discrimination.

The evidence during the month-long trial was extensive and demonstrated that there was a corporate culture of racial animus towards African Americans that was promulgated, fostered and condoned by a group of white senior managers, and that their racial animus was intentionally implemented through discriminatory promotion policies and practices that included, among other things, excessively subjective procedures and criteria for promotions. As the court of appeals recognized, Circuit City's management openly announced their views, stating that "the caliber of minorities and blacks who are in the company, in Circuit City, would not meet the standards for a corporate headquarters type job"; that blacks "had a propensity to steal"; and that there were "few, if any" blacks in decision-making roles, and management "didn't see that situation changing anytime soon because . . . those people who would be maybe eligible to be promoted upward just weren't there." (App. 7a)

The management bias was reflected in promotion decisions made throughout Circuit City's headquarters. Peti-

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[3] *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

tioners' statistical expert testified that the promotion rate for African Americans was substantially less than for Caucasians—by a factor of 7.2 standard deviations. Tr. 1616-17. The likelihood of this result occurring by chance (as opposed to deliberate discrimination) was calculated at 1 in 1.65 trillion. Tr. 1617. The statistical evidence was corroborated by the testimony of petitioners and 17 anecdotal witnesses who were denied promotions as a result of the excessively subjective personnel practices. (App. 16a-17a) The evidence also showed that Circuit City commissioned two special studies of its personnel practices and then "buried" the reports when they revealed racial discrimination. (App. 7a-8a) Finally, an expert in human resource management testified that Circuit City's excessively subjective promotion practices are conducive to discrimination and are consistent with the substantial disparity in promotions found by the statistical analysis. Tr. 2195-98, 2213.

At the conclusion of the trial, the jury unanimously found that Circuit City "engaged in a pattern or practice of racial discrimination (as related to promotions) against its former and present African American employees at its Richmond, Virginia Headquarters." Special Verdict Form at 1. The jury found in favor of Renee Lowery and awarded her $5,000 in back pay, $7,500 in compensatory damages, and $225,000 in punitive damages. The jury found in favor of Lisa Peterson and awarded her $1,500 in back pay, $2,700 in compensatory damages, and $47,000 in punitive damages. The jury found against Shelby McKnight.

The district court denied Circuit City's post-trial motions and upheld the jury's verdict. (App. 79a, 103a) The court also entered a broad injunction designed to remedy the pattern or practice of discrimination found by the jury. (App. 80a) The injunction required Circuit City to establish a department of diversity management to develop, implement, and oversee a revised program of more

objective promotion procedures. Provisions were also made for monitoring and enforcement of the injunction by petitioners' counsel and the court. At the hearing on the motion for a permanent injunction, the district court explained the need for broad remedial relief: "It is clear to me that Circuit City at its highest level is still in denial about [the jury's pattern or practice verdict]. And it is also clear to me that unless the Court does something, that there will never be any even recognition of this, but even more concrete than that, any change, any effort to change the situation. . . ." Tr. of Feb. 3, 1997, at 28-29. Finally, the injunction made provisions for the immediate promotion of Lowery.[4] Circuit City later moved for a stay of the injunction pending appeal, which the district court denied in a comprehensive opinion. (App. 46a) The court of appeals later stayed the injunction (except the provisions specific to Lowery) in a brief order. Fourth Circuit Order dated July 15, 1997.

B. Disposition on Appeal

Circuit City appealed to the Fourth Circuit seeking reversal of the adverse judgment in all respects. Petitioners cross-appealed the decertification of the class; the summary judgment against Sheila Smith, Patricia Spencer and Nadra Smith; the judgment as a matter of law against Ponnette Smith, Edward Stokes and Gregory Fleming; and the verdict against Shelby McKnight based on the district court's erroneous refusal to give a *Teamsters* instruction.

The court below began by affirming the district court's decertification of the class (App. 25a), concluding that the district court's have broad discretion to consider "factors other than those listed in Rule 23 in determining whether to certify a class action." (App. 22a-23a) The court therefore held that questions of superiority and ju-

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[4] Peterson was no longer a Circuit City employee and therefore did not need individual injunctive relief.

dicial economy could be considered in a Rule 23(b)(2) class action, even though those factors, by the express terms of Rule 23, are germane only to a Rule 23(b)(3) class action. The court acknowledged that its decision in this respect was in conflict with that of the Fifth Circuit in *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1105 (5th Cir. 1993). (App. 23a) The court of appeals also rejected the arguments of *amici* EEOC and NAACP that class actions are an important tool for enforcing the civil rights laws and obtaining complete relief for victims of discrimination.[5] The court was unwilling to give weight to these considerations because to do so, in its view, might mean that "nearly every suit alleging a pattern or practice of discrimination would be certified for class action . . . ." (App. 25a)

The court of appeals then concluded that because the class had been properly decertified, as "individual plaintiffs" the petitioners were not entitled to prove a pattern or practice of discrimination and could not take advantage of the *Teamsters* method of proof. (App. 30a) Individual plaintiffs, according to the court, must follow the evidentiary regime of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). (App. 32a) The court went on to conclude that none of the petitioners had satisfied his or her *McDonnell Douglas* burden except for the two (Lowery and Peterson) who prevailed at trial. (App. 32a-36a) The court acknowledged that statistical evidence of a pattern or practice of discrimination might help to prove pretext. (App. 35a) The court rejected that possibility in this case, however, because it believed that petitioners' expert failed to take educational level into account in his regression analyses, and the court concluded that "common sense dictates" that educational level must be an important factor in promotions at Circuit City. (App. 35a)

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[5] *Amicus curiae* briefs supporting petitioners were filed by the U.S. Equal Employment Opportunity Commission and NAACP Legal Defense and Educational Fund, Inc.

The court affirmed the jury verdict for Lowery and Peterson but vacated the punitive damage awards. The court held that punitive damages are appropriate only to punish and deter "particularly egregious conduct," and that proof of intentional discrimination was not sufficient, in and of itself, to warrant punitive damages. (App. 39a-40a) The court assessed the evidence and found Circuit City's conduct insufficiently egregious to justify punitive damages. (App. 40a)

The court also vacated the injunction in its entirety except for the provisions specific to Lowery. The court found that the injunction granted "what amounts to class-wide relief," and that such relief could be granted only in certified class actions. (App. 40a) The court held that because the pattern or practice issue should not have been submitted to the jury, the district court should not have granted the broad relief necessary to remedy the pattern or practice found by the jury. (App. 42a)[6]

REASONS FOR GRANTING THE WRIT

In the Civil Rights Act of 1991, Congress expanded the remedies available to victims of employment discrimination by authorizing jury trials to award compensatory and punitive damages, in addition to the existing equitable remedies of injunctive relief and back pay. The decision below, however, effectively forces victims of an intentional pattern or practice of discrimination to choose between their right to seek class-wide injunctive relief and their right to a jury trial to recover damages. The court of appeals' ruling, on the one hand, gives a district court essentially unfettered discretion to decertify or refuse to

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[6] Finally, the court vacated the district court's award of attorneys' fees and expenses to petitioners in the amount of $3,911,504.00. Because the award was based in large part on the success in obtaining the (now vacated) pattern or practice finding and the injunctive relief, the court remanded for a redetermination of the fees and expenses that should be awarded. (App. 43a-44a)

certify an employment discrimination class action seeking both injunctive relief and damages that satisfies all of the requirements of Rule 23(b)(2) whenever the court concludes that the class action procedure is not the superior method for trying the case. Yet at the same time, the court below ruled that such a case management decision irrevocably precludes a district court from exercising its discretion to allow plaintiffs representing a class of similarly situated persons an opportunity to prove and obtain appropriate relief for a defendant's intentional pattern or practice of discrimination. Because the case management issues that led to class decertification will be present in every class action under the 1991 Civil Rights Act, the practical effect of the ruling below will be to deprive representative plaintiffs with meritorious pattern or practice claims of their right to obtain both systemic injunctive relief and damages in accordance with the *Teamsters* presumption, and will relegate them to individual damage claims under *McDonnell Douglas*. That result is directly contrary to the congressional intent underlying the 1991 Civil Rights Act, is contrary to the text and purpose of Rule 23(b)(2), and conflicts with prior decisions of this Court as well as those of other circuits.

As the decisions below illustrate, the federal courts have struggled with the problem of trying a pattern or practice class action in which the plaintiffs seek injunctive relief as well as jury trials to determine damages. *See, e.g., Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998) (questioning propriety of certifying employment discrimination class actions seeking damages). The manner in which the courts balance the fundamental rights guaranteed by the civil rights laws with the questions of case management and fairness identified by the district court below is an important issue that should be addressed by this Court. This case is a particularly suitable vehicle in which to do so. The case included the full range of claims for injunctive relief as well as back pay, compensatory and punitive damages. The litigation involved both class certi-

fication and decertification decisions, and was tried to a jury verdict on all factual issues, with subsequent injunctive relief. All of these matters were fully explored in extensive judicial opinions by both the district and appellate courts. Accordingly, the case provides this Court with a complete legal and factual record on which to resolve the important questions presented.

I. THE CASE PRESENTS IMPORTANT QUESTIONS AFFECTING ENFORCEMENT OF THE CIVIL RIGHTS LAWS

Private actions play a vital role in the enforcement of Title VII and the other federal civil rights statutes. This Court has recognized that "the private right of action [is] an essential means of obtaining judicial enforcement of Title VII." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). The private litigant "not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." *Id.* Class actions play a particularly crucial role in the private enforcement of the civil rights laws. Individual employees may be reluctant to file suit and risk retaliation or disapproval by their employer. The class action provides strength in numbers and helps to counterbalance the greater resources normally available to the corporate employer. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972). Employers guilty of illegal discrimination often adopt an isolation strategy by which they attempt to circumscribe each employee's claim and have it considered separately from the claims of other employees and the general employment policies and practices in the company. Only by aggregating their claims can employees afford to take on a large company and conduct the discovery and trial that is required to prove a pattern or practice of discrimination.[7]

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[7] That is clearly the case here. In awarding attorneys' fees to the civil rights organization and law firms that represented the

For these reasons, the courts have long recognized that "it is particularly appropriate that suits to remedy violations of the [Civil Rights Act of 1964] be brought as class actions." *Romasanta v. United Airlines, Inc.*, 537 F.2d 915, 918 (7th Cir. 1976), *aff'd sub nom. United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977). *Accord Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 254 (3d Cir. 1975) (class actions "are the cutting edge of the Title VII sword").[8] These decisions are consistent with clearly expressed congressional intent. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975).

Congress further expanded Title VII when it passed the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. The Act, among other things, allows Title

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petitioners on a *pro bono* basis, the trial court noted that "Circuit City mounted a bitter defense, filed motion after motion, and failed to stipulate to even the simplest facts in this case. Even from the most neutral standpoint, it is apparent that Circuit City mounted a 'Stalingrad defense,' resisting plaintiffs at every turn and forcing them to win their 'hard-earned victory from rock to rock and from tree to tree.'" Memorandum Opinion dated June 25, 1997, at 12 (citation omitted).

[8] *See* 5 JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 23.43[1][a], at 23-191 (3d ed. 1998) ("Rule 23(b)(2) was promulgated in 1966 essentially as a tool for facilitating civil rights actions."); 5 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 24.01, at 24-7 (3d ed. 1992) ("Widespread utilization of class actions and judicial recognition that invidious discrimination is by its very nature a public, not private, wrong have served to correct the traditional imbalance of the litigation process.") (hereafter "NEWBERG ON CLASS ACTIONS"). This does not mean that every employment discrimination action alleging a pattern or practice of discrimination is automatically entitled to certification as a class action. Rather, petitioners contend that where, as in this case, an employment discrimination action satisfies the criteria set forth in Rules 23(a) and 23(b)(2) under the "rigorous analyis" required by *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982), decertfication or refusal to certify a class thwarts the important policies underlying Rule 23(b)(2).

VII plaintiffs to recover compensatory and punitive damages and gives them the right to a jury trial on such damages. There is no indication that the 1991 Act was intended to reduce or alter the important role that class actions play in civil rights enforcement. On the contrary, the purpose of the Act was "to strengthen existing remedies to provide more effective deterrence and ensure compensation commensurate with the harms suffered by victims of intentional discrimination." H.R. REP. No. 102-40(I), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 556. As this Court recently pointed out, the Act's "major expansion in the relief available" was designed "to further Title VII's 'central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.' " *Landgraf v. USI Film Products*, 511 U.S. 244, 254-55 (1994) (quoting *Albemarle*, 422 U.S. at 421).

The structure of Rule 23, Fed. R. Civ. P., also furthers this goal. Rule 23(b)(2) authorizes a class action where "the party opposing the class has acted or refused to act on grounds generally applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The Advisory Committee Notes state that civil rights cases "where a party is charged with discriminating unlawfully against a class" are "[i]llustrative" of the actions within the scope of Rule 23(b)(2). And this Court has noted that "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) class actions. *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2245 (1997). *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 389 (1967) (subdivision b(2) builds "on experience mainly, but not exclusively, in the civil rights field").

In keeping with the congressional intent and the design of Rule 23, employment discrimination class actions have been routinely brought and certified under Rule 23(b)(2). *See, e.g., Eubanks v. Billington,* 110 F.3d 87, 92 (D.C. Cir. 1997); *Probe v. State Teachers' Retirement Sys.,* 780 F.2d 776, 780 (9th Cir. 1986); *Holsey v. Armour & Co.,* 743 F.2d 199, 216 (4th Cir. 1984).[9] The courts have also approved 23(b)(2) certification where the class sought monetary relief in addition to injunctive and declaratory relief, so long as the monetary relief is not predominant. *See Eubanks,* 110 F.3d at 92 (back pay); *Probe,* 780 F.2d at 780 (compensatory damages); *Holmes v. Continental Can Co.,* 706 F.2d 1144, 1152 (11th Cir. 1983) (back pay); *Alexander v. Aero Lodge No. 735,* 565 F.2d 1364, 1372 (6th Cir. 1977) (back pay); *Butler v. Home Depot, Inc.,* 1997 U.S. Dist. LEXIS 16296, at *51-53 (N.D. Cal. Aug. 28, 1997) (compensatory and punitive damages); *Weigmann v. Glorious Food, Inc.,* 169 F.R.D. 280, 288 (S.D.N.Y. 1996) (back pay, compensatory and punitive damages); *Barefield v. Chevron, U.S.A., Inc.,* 48 Fair Empl. Prac. Cas. (BNA) 907, 910-11 (N.D. Cal. 1988) (back pay and punitive damages); *but cf. Ticor Title Ins. Co. v. Brown,* 511 U.S. 117, 121 (1994) (observing that there is "at least a substantial possibility" that monetary damage claims may not be maintained in a 23(b)(2) class action).[10]

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[9] *See also* 7A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE & PROCEDURE § 1776, at 495-96 (2d ed. 1986) (Rule 23(b)(2) "has proven to be highly effective in meeting the challenge of new types" of civil rights litigation because civil rights cases "generally involve an allegation of discrimination against a group as well as the violation of rights of particular individuals.").

[10] The "predominance" test applied by many courts derives from the Advisory Committee Notes to Rule 23, which state that subdivision b(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."

The judgment below is at odds with this line of authority and detrimental to effective enforcement of the civil rights laws. The district court properly certified the class under Rule 23(b)(2) and never changed its view that the case met all the requirements of Rule 23. On the contrary, the court specifically held that it "has never found that the class fails to satisfy any of the Rule 23 requirements." (App. 66a) The district court decertified the class only because fairness and efficiency concerns led it to conclude that "the class action procedure is not the best method of case management." (App. 109a) In effect, the court concluded that the class action was not superior to other methods of adjudication, such as consolidation of individual claims.

The court of appeals affirmed, even though it recognized that the factors motivating the district court's decision—manageability, fairness, efficiency and superiority—are germane only to a 23(b)(3) class action. (App. 24a, n.5) By virtue of this decision, the courts in the Fourth Circuit are now authorized to graft the 23(b)(3) requirements onto Rule 23(b)(2). This was clear error. Nothing in the text or purpose of Rule 23 supports this result, and it undermines the effectiveness of Rule 23(b)(2) as a tool for enforcement of the civil rights laws. The courts below were not at liberty to change the Rule's requirements. This is precisely the sort of "judicial inventiveness" that this Court disapproved in *Amchem*. As the Court pointed out, the lower courts "must be mindful that the rule as now composed sets the requirement they are bound to enforce . . . . Federal courts . . . lack authority to substitute for Rule 23's certification criteria a standard never adopted." 117 S. Ct. at 2248-49.

Equally troublesome are the broader implications of the decision below. It will now be difficult or impossible in the Fourth Circuit to maintain a class action to secure all of the class-wide and individual relief intended by Congress for victims of employment discrimination. The dis-

trict court was evidently daunted by the prospects of a bifurcated trial procedure with separate juries hearing the class-wide and individual claims. The case management problems confronting the district court will arise in *every* employment discrimination class action in which the plaintiffs seek injunctive relief as well as a jury trial on compensatory and punitive damages for individual class members. If these case management problems are sufficient to decertify the class, then *every* case can be denied certification. Employers who discriminate would have a powerful new weapon to blunt the force of the civil rights laws.

This Court has not yet determined what bifurcated trial procedures are appropriate in a pattern or practice class action where a jury trial has been demanded. A number of lower courts have considered the question, however, and have devised procedures similar to petitioners' proposal in this case.[11] Although petitioners believe that their proposed bifurcation plan was fair and workable, it is not the only potential solution.[12] What the

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[11] The basic bifurcation model is based on this Court's opinion in the *Teamsters* case. 431 U.S. at 360-62. The lower courts have adapted the *Teamsters* model to private discrimination cases. *See, e.g., Orlowski v. Dominick's Finer Foods, Inc.*, 172 F.R.D. 370 (N.D. Ill. 1997); *Griffin v. Home Depot, Inc.*, 168 F.R.D. 187 (E.D. La. 1996); *Butler v. Home Depot, Inc.*, 70 Fair Empl. Prac. Cas. (BNA) 51 (N.D. Cal.), *mandamus denied*, No. 96-70495 (9th Cir. Sept. 13, 1996), *cert. denied*, 117 S. Ct. 1106 (1997); *Neal v. Director, District of Columbia Dep't of Corrections*, 1995 U.S. Dist. LEXIS 11543 (D.D.C. Aug. 9, 1995); *Alvarado v. Carnation Co.*, 1995 U.S. Dist. LEXIS 10084 (D. Idaho June 23, 1995); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439 (N.D. Cal. 1994); *Barefield*, 48 Fair Empl. Prac. Cas. (BNA) at 912. It is now generally recognized that bifurcation is appropriate in employment discrimination cases. *See* FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, THIRD § 33.54, at 354 (1995); 5 NEWBERG ON CLASS ACTIONS § 24.123, at 24-414.

[12] For example, the court could have certified the issue of liability for a pattern or practice of discrimination pursuant to Rule 23(c)(4)(A), which permits certification with respect to particular

district court should not have been permitted to do is to disregard the text of Rule 23(b)(2) by decertifying the class entirely.

The court of appeals exacerbated the problem by restricting the district court's power to fashion an alternative procedural mechanism to the class action approach. The trial plan actually chosen by the district court at least allowed the case to go forward on the class-wide question of pattern or practice. The petitioners were allowed both to present their individual claims and to prove that Circuit City engaged in a pattern or practice of discrimination. The pattern or practice finding served as the predicate for the systemic injunctive relief granted by the district court. The finding would also have had collateral estoppel effect against Circuit City in the subsequent cases brought by other employees who were formerly class members.[13] It is apparent that the district court intended to give the class approximately the same benefits as class certification. This is evident from the court's opinion denying Circuit City's post-trial motion for judgment as a matter of law:

> Decertification merely for case management purposes does not remove the fact that a group of individuals who qualify for class treatment are entitled to class-wide relief.
>
> Therefore, although the case was not tried as a "typical" bifurcated class action discrimination suit, plaintiffs were still entitled to prosecute the class-wide pattern or practice claim of disparate treatment on behalf of other similarly situated individuals who would later be entitled to bring their own individual

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issues, and then determined how best to handle the damages stage of the litigation. *See Eubanks*, 110 F.3d at 96; 1 NEWBERG ON CLASS ACTIONS § 4.14, at 4-51.

[13] The district court apparently meant to adopt a "test case" procedure, which is sometimes employed as an alternative to a class action. *See* 1 NEWBERG ON CLASS ACTIONS § 4.27, at 4-110 to -113.

> claims into the justice system. Hence, t' : pattern or practice question was properly presented to the jury.

(App. 66a-67a)

The Fourth Circuit eviscerated the district court's trial plan when it held that plaintiffs may not attempt to prove a pattern or practice of discrimination in a non-class action and that the district court may not grant systemic injunctive relief in such circumstances. Had the district court known how much turned, in the Fourth Circuit's view, on class certification, it is doubtful that it would have decertified the class. The district court could have resolved its concerns by maintaining the 23(b)(2) certification for the class-wide issues, while leaving the certification of individual damage claims for later determination.

In ruling as it did, the Fourth Circuit not only imposed undue restrictions on the district court's discretion but failed to recognize that this case was filed and certified as "a class action alleging a general pattern or practice of discrimination," *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 876 (1984), and that although it was decertified for case management concerns, it was tried in all but name as the "liability stage of a pattern-or-practice trial" in which the focus was not on individual promotion decisions but on Circuit City's pattern of discriminatory decision making. *Id.* The Fourth Circuit literally elevated form over substance by holding that once the "class action" label was removed, for reasons unrelated to Rule 23(b)(2), the case was thereby automatically transformed into an "individual" claim of discrimination in which evidence of a pattern or practice could be used only to establish pretext with respect to such individual claims. By placing the emphasis on the procedural label rather than on the nature of the claims that were alleged and ultimately proved, the lower court had it backwards: the "class action" label does not determine whether a case involves a pattern or practice of discrimination; the alle-

gations and proof of a pattern or practice determine whether a case is an appropriate class action. The jury's finding that Circuit City engaged in an intentional pattern or practice of discrimination confirmed that this case was not an "individual claim" as defined by this Court in *Cooper*.

There is no reason in law or logic supporting the court of appeals' conclusion that plaintiffs may never attempt to prove a pattern or practice of discrimination and obtain the *Teamsters* presumption unless a case is certified and tried as a "class action." If a group of representative plaintiffs is willing and able to prove that their employer engaged in a deliberate pattern or practice of racial discrimination, as in this case, there is no reason why they should not get the benefit of the *Teamsters* presumption, and no reason why the court should be precluded from entering the injunctive relief necessary to eliminate the pattern or practice of discrimination. It is, after all, the central statutory purpose of Title VII to "eradicat[e] discrimination throughout the economy." *Landgraf*, 511 U.S. at 254. It would be anathema to that purpose if ingrained, pervasive discriminatory practices were permitted to remain in operation solely because of a procedural decision on class certification that is unrelated to the question whether the class meets the requirements of Rule 23(a) and (b)(2). The court of appeals' decision is also illogical because as the court itself concedes (App. 29a), the pattern or practice *evidence* will in any event be admissible in an individual case on the issue of pretext. Because the evidence can be offered regardless of class certification, it is highly artificial to say that the evidence cannot serve as a basis for a *Teamsters* presumption and injunctive relief.

In the final analysis, the Fourth Circuit's decision leaves both district courts and employment discrimination plaintiffs in an untenable position. District courts are permitted to exercise their discretion to avoid meritorious employ-

ment discrimination class actions, but having done so are not permitted to exercise their discretion to fashion other mechanisms for the trial of claims alleging a class-wide pattern or practice of discrimination. Similarly, plaintiffs who are victims of a pattern or practice of discrimination, and who wish to obtain broad injunctive relief, will be forced to bring a class action. Yet to do so they may be required to drop their claims for compensatory and punitive damages, which are authorized by the 1991 Civil Rights Act, lest the class action be judged "inefficient," "unfair" or "unmanageable." If the plaintiffs file a non-class action to preserve their damages claims, however, they will be prohibited from seeking a pattern or practice finding and corresponding systemic injunctive relief. This procedural impediment to enforcement of the civil rights laws is wholly inconsistent with the congressional purposes underlying those statutes.

II. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

The court of appeals' decision is substantially at odds with prior decisions of this Court and of other courts of appeals. The conflict is sharpest on five discrete issues, which are discussed separately below.

A. Consideration of Manageability and Superiority in a 23(b)(2) Class Action

The court of appeals held that manageability, efficiency and superiority may be considered in certifying or decertifying a 23(b)(2) class action, even though Rule 23 expressly provides that those factors are germane only to a 23(b)(3) class action. (App. 24a) Insofar as it invents certification criteria that are absent from Rule 23(b)(2), the court of appeals' decision is contrary to this Court's *Amchem* opinion. 117 S. Ct. at 2248-50. The lower court's decision is also inconsistent with other circuit court

decisions. The court itself recognized (App. 23a) that its decision was in conflict with *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1105 (5th Cir. 1993), in which the Fifth Circuit held that "questions of manageability and judicial economy are also irrelevant to 23(b)(2) class actions." The Third, Sixth, Seventh and Ninth Circuits are also aligned against the court below on this issue. *See Norris v. Frame*, 585 F.2d 1183, 1189 n.18 (3d Cir. 1978) (superiority need not be shown under (b)(2)); *Penland v. Warren County Jail*, 797 F.2d 332, 334 (6th Cir. 1986) ("The 'superior method' criterion has been held relevant, however, only to class actions sought to be certified under F.R.C.P. 23(b)(3)."); *Alliance to End Repression v. Rochford*, 565 F.2d 975, 979 (7th Cir. 1977) (unmanageability argument rejected as "frivolous" in a (b)(2) case); *Elliott v. Weinberger*, 564 F.2d 1219, 1229 (9th Cir. 1977) ("Rule 23 makes manageability an issue important only in determining the propriety of certifying an action as a (b)(3), not a (b)(2) class action"), *aff'd on this issue sub nom. Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The court of appeals in this case was clearly embarked on a foray into "judicial inventiveness" that was unauthorized by Rule 23 or established precedent.

Indeed, this case presents the other side of the coin considered in *Amchem*. In that case, the Court rejected an effort by the district court to expand the application of Rule 23 in the name of judicial efficiency to facilitate the strong public policy in favor of settlement of litigation. Here, by contrast, the court below has *restricted* the application of Rule 23 in the name of judicial efficiency but *contrary* to the strong public policies embodied in the civil rights laws. This Court should make clear that the lower courts are no more free to circumvent the text of Rule 23 in order to avoid class actions that were contemplated and encouraged by Congress than they are free to invent new forms of class actions that were not contemplated by Congress.

B. Permissibility of Proving Pattern or Practice in a Non-Class Action

The court below held that employment discrimination plaintiffs may seek to prove a pattern or practice of discrimination and invoke the *Teamsters* presumption only in a certified class action. (App. 29a) This holding is inconsistent with the reasoning of this Court's decision in *Cooper*, and conflicts with the Eleventh Circuit's decision in *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986). In *Cox*, the court held that a group of 21 individual plaintiffs were entitled to prove a pattern or practice of discrimination and should have been given the benefit of the *Teamsters* presumption.

The court below attempted to distinguish *Cox* on the theory that the Eleventh Circuit also held that the case before it should have been certified as a class action. (App. 31a) It is evident from the *Cox* opinion, however, that the pattern or practice holding was independent of the class certification issue. The Eleventh Circuit stated:

> We are conscious that *Teamsters* and *Franks* both involved large classes rather than individual plaintiffs. But the plaintiffs here are not, as in *McDonnell Douglas*, simply "individual complainant[s] seeking to prove one instance of unlawful discrimination." [citations omitted]. Once the trial court found that ACIPCO [the employer] in fact had a policy of reserving plant clerical jobs for men, these individuals were in substantially the same position as the *Teamsters* and *Franks* plaintiffs—that is, they had proven that sex discrimination "was the company's standard operating procedure," and they were entitled to the presumption that the complained-of employment practices violated Title VII.

784 F.2d at 1559. Plainly, the Eleventh Circuit thought that *Teamsters* should apply even where the pattern or practice is proved by "individual plaintiffs" rather than "large classes." Moreover, this is precisely how *Cox* has

been interpreted and applied by the district courts in the Eleventh Circuit. *See Forehand v. Florida State Hosp.*, 839 F. Supp. 807, 813 (N.D. Fla. 1993) (while most pattern and practice cases "have been litigated as large class actions, private-sector pattern and practice claims have also been entertained in actions that involve, as this case does, a limited number of individual plaintiffs," (citing *Cox)), aff'd in part and vacated in part on other grounds,* 89 F.3d 1562 (11th Cir. 1996). The conflict with *Cox* is real.

C. Admissibility of Statistical Evidence

Petitioners presented expert testimony in statistics by Dr. Andrew Harless, who analyzed data provided by Circuit City concerning promotion rates for the 5,617 employees at Circuit City's headquarters, 1,564 of whom were African Americans. Tr. 1606-21. He determined that the promotion rate for African Americans was 6.5% per year less than for Caucasians, which is 7.2 standard deviations from the mean. Tr. 1616-17. The odds of this result occurring by chance (as opposed to deliberate discrimination) is 1 in 1.65 trillion. Tr. 1617. To confirm his findings, Dr. Harless performed numerous regression analyses, changing the independent variables, and he performed several different types of regression analyses. All of these tests yielded results comparable to the 7.2 standard deviations observed initially. Tr. 1621-22. Dr. Harless's analysis was corroborated by the analysis performed by Circuit City's statistical expert, whose results, when properly aggregated for company headquarters as a whole, showed a disparity in promotion rates equal to 4.5 standard deviations from the mean. Plaintiffs' Trial Exh. 3986. Dr. Harless's results also were confirmed by the testimony of Circuit City management witnesses, who acknowledged that although the company hires equally qualified black and white employees, and although the policy is to train and promote from within, there are virtually no African Americans in

supervisory or managerial positions at company headquarters.[14]

The court of appeals acknowledged that, in general, evidence of a pattern or practice of discrimination may be used by individual plaintiffs to prove pretext. (App. 29a-30a) The petitioners could not do so in this case, according to the court, because the "probativeness" of their statistical evidence was "weakened." (App. 36a)[15] The court reached this conclusion because it thought that petitioners' expert had failed to control for educational level in his regression analysis. (App. 35a) This holding is directly contrary to *Bazemore v. Friday*, 478 U.S. 385, 400 (1986), in which this Court held that the failure to include some variables in a regression analysis "will affect the analysis' probativeness, not its admissibility." The Court went on to emphasize that "a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case" because the plaintiff "in a Title VII suit need not prove discrimination with scientific certainty. . . ." *Id.* Ironically, the court being reversed in *Bazemore* was the Fourth Circuit, which has now made the same error again.

In the present case, the Fourth Circuit seemed to think that educational level was so important that its omission

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[14] For example, only four African Americans had ever been promoted to the position of manager at corporate headquarters, and in the largest headquarters division, which had grown from five employees in 1990 to approximately 1200 by the time of trial, only two African Americans had risen above the lowest management rank of assistant supervisor. Tr. 1159-60, 1958-59, 3385-94, 3468-70.

[15] The court did not explain why the purported weakness in the statistical evidence should invalidate petitioners' entire pattern or practice case. As described above, the statistics were only one of five evidentiary components of the pattern or practice case. The first part of the court's opinion recognizes the breadth of the pattern or practice evidence (App. 5a-9a), but the court overlooks it later when reaching its conclusions. (App. 30a)

from the regression analysis invalidated the entire statistical study. (App. 36a) But it is not apparent how the court could have reached that conclusion. Certainly nothing in the record supports it. On the contrary, Mr. Zierden, Circuit City's Vice President of Human Resources, testified that educational level was not a significant factor in promotions, and he pointed out that Mr. Sharp, Chairman of the company, did not have a college degree. Tr. 2030-32. The court stated that 55% of the work force had college degrees, while only 33% of African Americans had degrees. (App. 35a) The significance of this statistic is not apparent, as it has no bearing on the importance of a college degree for any job position or promotion. In the end, it appears that the court was relying on its own "common sense." (*Id.*) Petitioners submit that this is not an adequate basis for an appellate court to reject a statistical analysis admitted by the district court and found persuasive by the jury. *Bazemore* precludes such a result.

In addition to the legal error, the factual premise for the court of appeals' holding is incorrect. Both statistical experts *did* consider educational level and factor it into their respective analyses. The data were incomplete because Circuit City failed to record educational level for all its employees.[16] However, to the extent the information was available, both experts used it. *See* Plaintiffs' Trial Exhs. 3960, at 2, 3975-78; Defendant's Trial Exh. 684, at 14-15 & Tables I, II & III. The issue was specifically raised at trial because petitioners' expert, Dr. Harless, had not received the data in time for his deposition and so could not be questioned by Circuit City about the education analysis at the deposition. The district judge asked Dr. Harless about the analysis during voir dire at trial. Tr. 1558-64. He testified that the regression analysis using education produced exactly the same result as anal-

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[16] Education data were missing for 1,543 of the employees studied by the experts. *See* Defendant's Trial Exh. 684, at 15 n.11.

yses that omitted this variable. Tr. 1561, 1562. Since the education analysis had no effect on the results, and in light of Circuit City's inability to depose Dr. Harless on this subject, the district court directed Dr. Harless not to address it in his testimony. Tr. 1562.

Circuit City's expert, Dr. Haworth, reached essentially the same conclusion. She found that education was a positive factor in promotions in job categories characterized as "officials and managers" and "office and clerical," but negative in the "sales" and "professionals and technicians" categories. Defendant's Trial Exh. 684, at 19-22 (Table I). In any event, the results were "not statistically significant." *Id.* at 23. Thus, the education variable was considered as fully as possible by both experts and found to be immaterial. The court of appeals' contrary conclusion is simply a misunderstanding of the record, which exacerbates the court's violation of *Bazemore*.

D. Propriety of Injunctive Relief

The jury heard four weeks of evidence and found as a fact that Circuit City engaged in a pattern or practice of intentional racial discrimination and that it specifically discriminated against Lowery and Peterson. Other than the unfounded attack on the statistical evidence discussed above, neither of the courts below has intimated any basis for questioning the jury's factual findings of a pattern or practice of discrimination. The district judge heard all the same evidence. After the trial, he exercised his discretion to enter a systemic injunction that he found necessary to eliminate the discriminatory practices at Circuit City's headquarters. The court of appeals vacated the injunction because the class had been decertified, and "class-wide relief" was therefore inappropriate. (App. 40a) The court concluded that the injunction should be no broader than necessary to give the individual prevailing plaintiff complete relief. (App. 41a) As a result of the court of appeals' decision, Circuit City is free to—and presumably continues to—implement its policies and

practices of discrimination in promotions, to the continuing detriment of the hundreds of African Americans who work at the company's headquarters. This holding is contrary to the decisions of this Court, other courts of appeals and the congressional policies underlying the civil rights laws.

This Court has made it clear that "[w]here racial discrimination is concerned the district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albemarle Paper Co.*, 422 U.S. at 418 (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)). And once a violation has been shown, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *United States v. Paradise*, 480 U.S. 149, 183 (1987) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)). The choice of remedies to redress racial discrimination is a balancing process left to the sound discretion of the trial court. *Id.* at 184. But when fashioning injunctive relief under Title VII, the district court is obligated to grant "the most complete relief possible." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976).

The decertification of the class has no effect on the scope of the injunctive relief. This Court has held that a district court's equitable powers under Title VII are not limited to make-whole relief for the identified victims of discrimination. Rather, the court may grant systemwide relief where necessary "to dismantle prior patterns of employment discrimination and to prevent discrimination in the future." *Sheet Metal Workers Local 28 v. EEOC*, 478 U.S. 421, 474 (1986). Such injunctive relief properly benefits all affected employees, not just those who have come forward and proved that they were victims of the discriminatory practices. *Id.* at 471. *See Teamsters*, 431

U.S. at 361 n.47 (district court should "devise prospective relief designed to assure that employers found to be in violation of [Title VII] eliminate their discriminatory practices and the effects therefrom.") Without broad and effective injunctive relief, it will be impossible to fulfill Congress's central statutory purpose of "eradicating discrimination throughout the economy." *Landgraf*, 511 U.S. at 254. Indeed, it clearly thwarts that purpose to leave in place and undisturbed a proven pattern or practice of intentional discrimination at one of the largest employers in Richmond.

The lower court's decision is also in conflict with that of the Fifth Circuit in *Meyer v. Brown & Root Construction Co.*, 661 F.2d 369 (5th Cir. 1981). There, the court rejected the employer's contention that injunctive relief must be narrowly tailored to benefit only the individual plaintiff. The court focused on "the essential nature of Title VII suits" in which the individual plaintiff "takes on the mantel of the sovereign" in order to "eliminate discrimination." 661 F.2d at 373. Concomitantly, the "court trying a Title VII suit bears a special responsibility in the public interest to resolve the employment dispute by determining the facts regardless of the individual plaintiff's position," because whether so named or not, "the suit is perforce a sort of class action for fellow employees similarly situated." *Id.* (quoting *Hutchings v. United States Indus., Inc.*, 428 F.2d 303, 310 (5th Cir. 1970)).

Petitioners submit that *Meyer* correctly applies the law and furthers the purposes of Title VII. The court of appeals should have done the same in this case.[17]

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[17] The decision below is also inconsistent with *Evans v. Harnett County Board of Education*, 684 F.2d 304, 306 (4th Cir. 1982), in which a different panel of the Fourth Circuit held that "[a]n injunction warranted by a finding of unlawful discriminaton is not prohibited merely because it confers benefits upon individuals who were not plaintiffs or members of a formally certified class."

E. Reversal of the Jury Verdict on Punitive Damages

The jury found that Circuit City intentionally discriminated against Lowery and Peterson and awarded them $225,000 and $47,000, respectively, in punitive damages. The district court concluded that the evidence was sufficient to warrant punitive damages and that the amounts awarded were reasonable. (App. 101a-103a) The court of appeals affirmed the finding of liability and the compensatory damage awards in favor of petitioners Lowery and Peterson. (App. 36a, n.7) Moreover, with the exception of the statistics, the court of appeals did not question the sufficiency of the evidence supporting the jury finding that Circuit City engaged in an intentional pattern or practice of discrimination. Yet the court vacated the punitive damage awards on the theory that punitive damages are an "extraordinary remedy" that may be used only for "particularly egregious conduct," which it found did not exist in this case. (App. 39a-40a) The court held that evidence of intentional discrimination, although "reprehensible and abhorrent," would not alone be sufficient to submit the issue of punitive damages to the jury. (*Id.*) Although proof of intentional discrimination would be sufficient for compensatory damages, something more "egregious" would have to be shown, in the court's view, to get the issue of punitive damages to the jury. (*Id.*) Applying this rule to the case at hand, the court of appeals decided that petitioners Lowery and Peterson each had unspecified "problems" that contributed to their failure to obtain promotions. (App. 40a) The court therefore concluded that Circuit City's conduct, although intentionally discriminatory, was not sufficiently "egregious" to warrant punitive damages. (*Id.*)[18]

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[18] The court's reevaluation of the evidence is reminiscent of the error for which the same court was reversed in *Anderson v. Bessemer City*, 470 U.S. 564 (1985) (court failed to give due deference to the trial court's findings of fact under the "clearly erroneous" standard of Fed. R. Civ. P. 52(a)). The court's dismissive ap-

This case squarely presents an issue on which the circuits are split: Whether, under 42 U.S.C. § 1981, evidence of intentional discrimination sufficient to raise a jury question on liability and compensatory damages is also necessarily sufficient to get the issue of punitive damages to the jury.[19] This is substantially the same issue that the Court recently granted certiorari to review in *Kolstad v. American Dental Ass'n*, No. 98-208 (Nov. 2, 1998). The only difference is that in *Kolstad* the issue arises under Title VII, while in this case it arises under section 1981.

The Fourth Circuit's position on this issue is inconsistent with that of the D.C. Circuit expressed in *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995). There, applying section 1981, the court held that "evidence that suffices to establish an intentional violation of protected civil rights also may suffice to permit the jury to award punitive damages . . . ." 48 F.3d at 1277.[20] The First, Second, Eighth and Tenth Circuits have adopted this view. *See Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987) (proof of intentional discrimination gives jury "discretion to determine whether punitive damages are necessary"); *Luciano v. Olsten Corp.*, 110 F.3d 210, 219-20 (2d Cir. 1997) (rejecting "extraordinarily egregious" standard); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1065

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proach to the jury verdict, reflected in its repeated statements about what petitioners "alleged" or "attempted to demonstrate" at trial (*e.g.*, App. 4a, 7a, 11a), does not even pay lip service to the basic rule that the facts on appeal from a jury verdict are to be viewed in the light most favorable to the prevailing party. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962).

[19] The court of appeals focused on § 1981 because it concluded that the Title VII damage remdies are unavailable if the plaintiff can recover under § 1981. (App. 39a, n.9) *See* 42 U.S.C. § 1981a (a)(1).

[20] The Court granted certiorari in *Merrill v. Barbour* to resolve this issue under § 1981. 116 S. Ct. 805 (1996). However, the case was settled and the writ was therefore dismissed as moot. 116 S. Ct. 1037 (1996).

(8th Cir. 1997) (rejecting contention that punitive damages are limited to "exceptional circumstances of unusual bad motive that transcends ordinary intentional misconduct."); *Adakai v. Front Row Seat, Inc.*, 1997 U.S. App. LEXIS 27014, at *7 (10th Cir. Oct. 1, 1997) (rejecting "extraordinarily egregious" standard).

The lower court's decision in this case is consistent with the rule adopted in the Sixth and Ninth Circuits as well as the D.C. Circuit's rule for Title VII cases. *See Beauford v. Sisters of Mercy*, 816 F.2d 1104, 1109 (6th Cir. 1987); *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, 1304 (9th Cir. 1998); *Kolstad v. American Dental Ass'n*, 139 F.3d 958 (D.C. Cir. 1998) (en banc), *cert. granted*, No. 98-208 (Nov. 2, 1998). This split in the circuits is substantial and ought to be resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 14, 1998

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1372

RENEE LOWERY; LISA S. PETERSON,
Plaintiffs-Appellees,

and

SHELBY MCKNIGHT; GREGORY FLEMING; SONYA HAIRSTON; DYNELLE JOHNSON; NADRA SMITH; PONNETTE SMITH; SHEILA SMITH; PATRICIA SPENCER; EDWARD STOKES,
Plaintiffs,

v.

CIRCUIT CITY STORES, INCORPORATED,
Defendant-Appellant.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; WASHINGTON LEGAL FOUNDATION; EQUAL EMPLOYMENT ADVISORY COUNCIL; NATIONAL RETAIL FEDERATION; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.,
Amici Curiae.

No. 97-1470

SHELBY MCKNIGHT; GREGORY FLEMING; RENEE LOWERY; NADRA SMITH; PONNETTE SMITH; SHEILA SMITH; PATRICIA SPENCER; EDWARD STOKES; LISA S. PETERSON,
Plaintiffs-Appellants.

and

SONYA HAIRSTON; DYNELLE JOHNSON,
Plaintiffs,

v.

CIRCUIT CITY STORES, INCORPORATED,
Defendant-Appellee.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; WASHINGTON LEGAL FOUNDATION; EQUAL EMPLOYMENT ADVISORY COUNCIL; NATIONAL RETAIL FEDERATION; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.,
Amici Curiae.

No. 97-1917

SHELBY MCKNIGHT; RENEE LOWERY; LISA S. PETERSON,
Plaintiffs-Appellees,

and

GREGORY FLEMING; SONYA HAIRSTON; DYNELLE JOHNSON; NADRA SMITH; PONNETTE SMITH; SHEILA SMITH; PATRICIA SPENCER; EDWARD STOKES,
Plaintiffs,

v.

CIRCUIT CITY STORES, INCORPORATED,
Defendant-Appellant.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.,
Amici Curiae.

No. 98-1170

RENEE LOWERY,
Plaintiff-Appellee,

and

SHELBY MCKNIGHT; GREGORY FLEMING; SONYA HAIRSTON; DYNELLE JOHNSON; NADRA SMITH; PONNETTE SMITH; SHEILA SMITH; PATRICIA SPENCER; EDWARD STOKES; LISA S. PETERSON,
Plaintiffs,

v.

CIRCUIT CITY STORES, INCORPORATED,
Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond.
James R. Spencer, District Judge.
(CA-95-964)

Argued: April 9, 1998
Decided: September 14, 1998

Before MURNAGHAN, WILKINS, and HAMILTON,
Circuit Judges.

OPINION

HAMILTON, Circuit Judge:

This case involves claims of racial discrimination brought by eleven African-American current and former employees (collectively, the Plaintiffs) individually and on behalf of all African-Americans employed at the Richmond, Virginia headquarters (HQ) of Appellant, Circuit City Stores, Inc. Circuit City appeals from a jury verdict finding that Circuit City engaged in a pattern or practice of racial discrimination and that Circuit City discriminated against plaintiffs Renee Lowery (Lowery) and Lisa Peterson (Peterson) on account of their race. Circuit City also appeals from the district court's grant of injunctive relief, punitive damages, costs and attorneys' fees. Finally, Circuit City appeals the district court's grant of a motion by Lowery to compel Circuit City's compliance with a portion of the injunctive relief ordered and the district court's award of her reasonable attorneys' fees and costs incurred in connection with her motion in an amount to be subsequently determined. The Plaintiffs

cross-appeal the district court's decertification of their class action. We affirm in part, vacate in part, and remand with instructions.

I

Circuit City owns and operates a rapidly growing chain of retail consumer electronic stores that by January 1996 employed 37,000 "associates" nationwide. By November 1996, Circuit City employed 3,500 people at its Richmond HQ, about 800 of whom were African-Americans. Several hundred other Circuit City employees work for a wholly-owned subsidiary called First North American National Bank (FNANB), which operates as a separate and distinct entity, providing consumer credit to Circuit City's customers.

Lowery, Peterson and the other nine Plaintiffs, Shelby McKnight, Gregory Fleming, Sonya Hairston, Dynelle Johnson, Nadra Smith, Ponnette Smith, Sheila Smith, Patricia Spencer and Edward Stokes, are African-American current and former employees of Circuit City and FNANB. The Plaintiffs filed this action in late 1995, alleging that Circuit City and FNANB (collectively, Circuit City) have a corporate culture of racial animus toward African-Americans, promulgated, fostered and condoned by a group of white senior managers. Plaintiffs claim that Circuit City's all-white management intentionally carried out their racial animus and stereotypical thinking through discriminatory promotion policies and practices that included, among other things: (1) excessively subjective procedures and criteria used to deny opportunities for promotion to qualified African-Americans; (2) making the existence of job promotion vacancies known only through informal networks of white employees rather than through formal job posting procedures; (3) requiring African-American employees to satisfy more onerous requirements for promotion than those required for white employees; and (4) maintaining more onerous performance standards for African-American employees than for similarly situated white employees.

A. *Evidence of a Pattern or Practice of Racial Discrimination*

Circuit City's promotion practices are developed in Circuit City's Human Resources (HR) Division. Between 1984 and 1996, HR was headed by William Zierden, a former business professor from the University of Virginia. Zierden believed that large companies are hampered by bureaucracy, including "rigid systems of job descriptions and rigid [qualifications]" for the people to fill job openings. (J.A. 2680). Zierden accordingly implemented an HR system which Circuit City claims limits bureaucracy and gives employees and managers wide freedom of action. Circuit City produced evidence that this philosophy has strong support among management experts.

Circuit City's management policy requires all managers and supervisors to attend a week-long "Managing Through People" seminar that instructs them in appropriate supervision. (J.A. 2194). Managers receive training on promotions, including how to interview and evaluate employees. According to Circuit City, managers are warned not to use impermissible selection criteria, and are admonished that "Circuit City firmly believes all associates and customers should be treated with respect. We have policies in place to achieve this goal. Circuit City is an equal opportunity employer who has set policies and standards to comply with all federal and state laws which forbid discrimination." (J.A. 1723).

The Plaintiffs claim that Circuit City's management style has encouraged and fostered racial discrimination in promotions. According to the Plaintiffs, Circuit City: (1) has no written procedures indicating how managers and supervisors should go about promoting employees; (2) has no written procedures or practices requiring a review, either by HR or anyone else, of any promotion decision; (3) does not require promoters to post or advertise job openings, but permits them to announce an opening to a single candidate of the promoter's own

choosing without notifying anyone else of the vacancy; and (4) when a job opening is posted, has no requirements about what the posting should contain. Furthermore, Plaintiffs allege that a promoter has unfettered discretion to use any procedures he or she desires when making a promotion decision. For example, a promoter has full discretion to establish the minimum qualifications necessary for a position and the weight to be given to the factors considered in making the decision. The Plaintiffs note that the majority of those making promotion decisions at HQ are white, and claim that the result of Circuit City's promotion policies is that only white employees are promoted above the assistant supervisor level.

Circuit City, on the other hand, argues that its promotion policies have produced a racially diverse work force. Circuit City claims that the percentage of African-American employees at HQ increased from 19.5 percent in 1992 to 22 percent in 1995, while the full-time African-American workforce outside the company averaged about 19 percent during this time. Circuit City notes that, of the 6,200 employees at HQ from 1992 to 1995, 1,564 were African-American, with about 100 in professional and managerial positions, and approximately 600 were members of other minorities. Moreover, Circuit City claims that, for each significant occupational category defined by the United States Census Bureau, Circuit City employs more African-Americans than the external labor pool would indicate. As an example, Circuit City mentions that from 1992 to 1995, it hired 375 people within the "officials and managers" category; although the relevant pool was only 4 percent African-American, Circuit City hired over 9 percent African-Americans.

Circuit City also claims that the vast majority of job openings are posted in a company-wide publication, via E-mail, and over a vacancy hotline. Nevertheless, while company policy favors posting vacancies, it does not require it. Moreover, Circuit City does not have formal career paths or mandatory company-wide promotion cri-

teria; instead, supervisors base promotions on many factors, including performance, length of service, time in position, and education. To be promoted, an employee generally must have served at least six months in his/her current position (three months in FNANB) without disciplinary action. However, these rules may be waived.

There is no measurement made by anyone at Circuit City, including HR, as to the effects of these promotion practices and procedures on African-Americans as compared to whites. Zierden could recall only four black managers at HQ during his tenure. Only two out of roughly fifty or sixty group managers and managers in the accounting division were African-American. At FNANB, there has never been an African-American director or manager, and only two African-Americans have risen above the assistant supervisor rank to the level of supervisor.

At trial, Plaintiffs attempted to demonstrate management's racial animus by introducing evidence that certain high level employees of Circuit City have made racially disparaging comments. For example, Zierden allegedly advised Larry Jones, an applicant for a position in HR, that "the caliber of minorities and blacks who are in the company, in Circuit City, would not meet the standards for a corporate headquarters type job, and in particular this type job." (J.A. 3145). He also allegedly said that blacks who worked in Circuit City's retail stores "had a propensity to steal." (J.A. 3145-46). As for blacks in decision-making roles at Circuit City, Zierden allegedly told Jones there were "few, if any," blacks in such jobs and "he didn't see that situation changing anytime soon because . . . those people who would be maybe eligible to be promoted upward just weren't there." (J.A. 3148). Zierden allegedly made similar comments to others. Complaints about Zierden to Circuit City's CEO, Rick Sharp, allegedly had no effect.

The Plaintiffs also attempted to demonstrate management's racial animus by introducing evidence that Zierden

"buried" two internal reports, known as the Booth and Cook Reports, that were critical of Circuit City's promotion policies and diversity results. In December 1990, Zierden instructed Karen Booth, an employee in HR, to perform a study of how well Circuit City manages diversity in its workplace. Booth's January 1991 report noted, among other things, that statistics on Circuit City's store employees showed that "[t]he promotion ratio for male and non-minority [sales] counselors are [sic] significantly higher than those for women and minorities." (J.A. 838). Booth concluded that "[i]t is my assumption that many female and minority associates look up the ladder and see no one there like themselves. They perceive no upward mobility beyond a certain level and they look for opportunities outside the company." (J.A. 864, 2641). Zierden allegedly directed Booth to retrieve all copies of the report that she had given to other managers, and never discussed the report with any other Circuit City executives. The Plaintiffs assert that Zierden never independently checked the accuracy of Booth's statistical findings, nor attempted any kind of statistical analysis of promotion rates between minorities and non-minorities or of differences in rates of salary growth between blacks and whites.

In May 1995, Circuit City retained Sarah Cook, a graduate student in psychology at the University of Virginia, to conduct a survey and prepare a written report on employee job satisfaction at FNANB. Cook worked on the project for approximately seven months, was paid approximately $6,500 by Circuit City, and produced a written report in January 1996. Cook's report noted, among other things, employee concerns that one had to belong to certain cliques in order to get promoted, and that minorities felt excluded. Comments by survey respondents included: "I hate to express this but race affects promotions" and "Minorities are constantly overlooked for promotions and will continue to be overlooked until someone takes legal action against FNANB." (J.A. 1106). Cook's report concluded that a sizeable number of asso-

ciates perceived that minority associates are not treated equally to majority associates. Cook had recommended that Circuit City review its company policies and practices, but noted that the company's response was defensive and dismissive.

Circuit City never distributed the Cook report to its employees, but instead circulated a short memorandum purporting to summarize the survey's results. The memorandum said nothing about Cook's findings and recommendations about promotion procedures. Moreover, according to the Plaintiffs, Circuit City took no action concerning the complaints about promotions, and made no changes in its promotion practices.

B. *Evidence of Individual Discrimination*

In addition to the allegation of a pattern or practice of discrimination, the Plaintiffs claimed they suffered individual discrimination due to their race. Plaintiff Lowery joined Circuit City in October 1989 as a management recruiter in HR after completing her MBA. Lowery's manager, Catharine Madden, gave Lowery high performance reviews through mid-1994, although it appears Madden gave most of her employees high ratings. Lowery performed her recruiting responsibilities well, exceeding her numerical recruiting goals through July 1995, and became Circuit City's most senior and highly paid recruiter. Despite this success, however, Lowery unsuccessfully sought approximately seven promotions in seven years.

Circuit City produced evidence that, notwithstanding Lowery's recruiting skills, she had several problems throughout her tenure. Although Lowery performed well for some hiring managers, Circuit City claimed she neglected following up for others, and one recruiter even asked not to work with her again. Evidence was presented that she had problems training new recruiters, showed little leadership and, according to her peers, she

was not a team player. Circuit City asserted that Lowery did not participate in staff meetings, volunteer to attend job fairs, or share resumes with other recruiters. She also allegedly lacked focus in interviews, and one African-American supervisor found Lowery's oral style rambling and unstructured. When Lowery asked how to improve her chances of being promoted, she allegedly failed to take the steps that were suggested.

Lowery also presented evidence of Circuit City's alleged animus towards minorities. Lowery discovered, years after the fact, that the words "velveteen ghetto" had been handwritten on her 1989 interview schedule. (J.A. 881, 2137-38). She testified at trial that, in 1991, when she approached Austin Ligon, Vice President of Corporate Planning, about a position in his department, he suggested that she "could do better someplace else" at a company that was "more receptive to minorities and women." (J.A. 2091). Later, in 1993, Zierden allegedly told her he believed that sales decreased in stores with black managers, and that stores with Hispanic managers soon had only Hispanic employees.

One of Lowery's claims involved her application in October 1994 for a promotion to Supervisor of Management Recruiting. Cynthia Turner, Lowery's new manager, wanted to promote one of the department's recruiters to the position. Turner interviewed everyone in the department including Lowery and Paige Bell, who, along with Lowery, had also expressed interest in the position. The promotion was offered to Paige Bell, and Lowery asserts this decision was because Bell was white. Lowery noted that, while she had an undergraduate business degree and an MBA, Bell had neither. Lowery also had more supervisory experience before joining Circuit City, and had more seniority. Jeanne Linton, then the director of recruiting, testified that Lowery was one of her top three recruiters, yet admitted that the other two top recruiters, both of whom were white, were promoted to supervisory

positions within five years of starting with Circuit City, while Lowery has never been promoted during her seven years with the company.

Circuit City, on the other hand, claims Bell got the position because she was more organized than Lowery. For example, Circuit City produced evidence that, during her interview, Bell used an outline she had prepared which described ways to improve the department. Lowery, by contrast, allegedly rambled her way through the interview. Moreover, Circuit City claimed that there had been no complaints about Bell's recruiting style, that she participated in staff meetings and job fairs, and had once even managed the department while Madden was on leave and had earned her colleagues' respect.

Plaintiff Peterson also alleges she was passed up for promotion because of her race. Peterson joined FNANB in February 1993 as an accountant management representative. In July 1993 she entered FNANB's training program, which rotates associates through different departments every few months. In May 1994, Peterson rotated into an acting assistant supervisor position in the customer service mail department. It appears that Peterson again rotated into that department some time later. When a regular position became available in that department, Peterson applied for the position. Peterson's supervisor, Jodi Bischoff, rejected Peterson in favor of Janet Whalen, who is white. However, when offered the position, Whalen turned it down. Nevertheless, Circuit City did not then offer the promotion to Peterson, but allegedly handpicked another employee, Denise Ramos, for the position. Peterson left FNANB soon thereafter.

Peterson presented evidence that she was employed at FNANB at a time in which it grew from seven to 1,200 employees, and yet FNANB had no African-Americans among its twenty to thirty directors and managers, and had only two African-Americans among its thirty to forty lower-

level supervisors. Throughout her employment she received consistently high performance evaluations, allegedly until she applied for promotion. According to Peterson, Whalen had less experience than she did because Whalen had only one rotation as an FNANB trainee; Whalen never received supervisory experience in the customer service department; and Whalen had no familiarity with the reports and monitoring expected of an assistant supervisor in that department.

According to Peterson, Ramos had no prior customer service experience, no knowledge of the operating functions of the bank, no background contacting customers, and no knowledge of the company's computer system. Witnesses for Circuit City also admitted that, when Ramos was selected for the position, she was struggling in her current assistant supervisory position in another department and could not keep pace with her duties.

Circuit City, on the other hand, presented evidence that Whalen was selected over Peterson because Whalen was better qualified. While Peterson did not possess the college degree that FNANB preferred for supervisory positions, Whalen was a college graduate and former assistant supervisor. Bischoff testified that Peterson was also rejected because her performance was deficient during her two rotations as assistant supervisor. Peterson had been repeatedly cautioned for wasting work time by socializing with her supervisees, had submitted late and inaccurate monthly reports, and had completely failed to distribute three other reports. Moreover, Peterson allegedly could not competently analyze reports to identify trends in customer behavior. Finally, Circuit City alleges that Peterson received several oral warnings about her responsibilities, but she still neglected her supervisory role while she attempted to master the paperwork.

C. *Proceedings in the District Court*

Plaintiffs filed this case in the United States District Court for the District of Maryland on October 31, 1995, alleging, pursuant to 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17, that they represented a class of African-American current and former employees at HQ who were victims of Circuit City's intentional pattern or practice of racial discrimination in employment.[1] In all, Plaintiffs' complaint alleged fifty instances of discriminatory hiring, promotions and transfers at HQ. The Plaintiffs sought: (1) a declaration that Circuit City's actions violate Title VII and § 1981; (2) a permanent injunction prohibiting Circuit City from engaging in racially discriminatory conduct and requiring it to take measures to dismantle its racially discriminatory practices; (3) compensatory damages for financial loss, humiliation, embarrassment, emotional distress, mental anguish, deprivation of the right to contract on an equal basis with other persons regardless of race and deprivation of opportunities of promotion, compensation and transfer; (4) punitive damages; and (5) an award of attorneys' fees and expenses.

On November 29, 1995, the Maryland District Court transferred the case to the United States District Court for the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(a). On February 25, 1996, the district court dismissed the claims of Hairston and Johnson as time barred, leaving a suit aggregating forty-six claims by nine Plaintiffs.

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[1] The original complaint only alleged claims under § 1981. In addition, Peterson filed her case separately, but the district court consolidated her case with that of the other ten plaintiffs. The Plaintiffs later amended their complaint to include class action claims under Title VII and to add Peterson as a plaintiff.

On April 30, 1996, the district court granted the Plaintiffs' motion to certify the suit as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2). The district court certified a mandatory, non-opt-out class composed of all African-Americans employed at HQ after April 18, 1992. The district court found that the Plaintiffs satisfied the commonality, typicality, adequacy of representation, and numerosity requirements of Federal Rule of Civil Procedure 23(a) in alleging that subjective decision-making processes had caused racial discrimination against black Circuit City employees. Noting that Rule 23(b)(2) certification is typically granted in employment discrimination cases even where monetary damages are requested, the district court certified the class in accordance with Rule 23(b)(2). However, the district court stated that the certification was conditional; if events so warranted, the district court reserved the ability to alter or decertify the class puruant to Rule 23(c)(1).

On August 23, 1996, the district court, *sua sponte*, did in fact decertify the class because of what it deemed problems of fairness and efficiency. During discovery, the Plaintiffs had filed a list of forty-six non-named class members they planned to call as trial witnesses, and acknowledged the existence of perhaps 200 additional class members with claims. Plaintiffs moved to have the district court sever the issues and adopt a bifurcated trial plan whereby the case would be tried in two stages. In Stage 1, a jury (the Class Jury) would decide class-wide liability and punitive damages, along with liability and compensatory damages on the individual claims. In Stage 2, compensatory damages for class members would be determined.[2]

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[2] The Plaintiffs' proposed trial plan was as follows. In Stage 1, the Class Jury would determine: (1) class-wide liability, including whether Circuit City engaged in a pattern or practice of racial discrimination with respect to promotions or transfers at HQ; (2) class-wide punitive damages; (3) liability and compensatory damages for the named Plaintiffs. At the conclussion of Stage 1 the

The district court determined that a class action would be unfair and inefficient. First, the determination in Stage 1 of punitive damages for the entire class would be based only on evidence of (1) disparate treatment as to the class and (2) actual harm and compensatory damages as to the named Plaintiffs. In other words, the Class Jury would make its determinations without the entire universe of information, including actual harm to the individual class members and Circuit City's legitimate, non-discriminatory reasons for allegedly adverse employment actions. The district court found this to be unfair to Circuit City. Second, the district court found the method of trying class members' claims to a series of two-week juries to be cumbersome and inefficient. Moreover, evidence Circuit City would bring forth to rebut individual claims in Stage 2 would be relevant and admissible in Stage 1, thus inviting the needless repetition of evidence. The district court concluded that the benefits of class certification—accelerated and efficient disposition—would not necessarily follow in the case, but unfairness to Circuit City would be a likely result.

The district court held that the trial of the individual Plaintiffs' claims would proceed to trial as scheduled, where the issues of individual liability, damages and puni-

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Class Jury would be discharged and, if appropriate, the court would grant declaratory and/or injunctive relief.

If there was a finding of class-wide discrimination during Stage 1, then Stage 2 proceedings would commence. Notice of claims would be sent to class members, who would be allowed to file claims. The parties would be permitted to conduct limited discovery concerning these claims, and the class members' claims would be tried to a series of separate juries, each sitting for approximately two weeks, until the claims of all class members had been heard. These separate juries would determine whether each class member was a victim of Circuit City's discriminatory conduct and, if so, the amount of compensatory damages to be awarded to that class member. Finally, the court would determine and award each Plaintiff and class member receiving compensatory damages a portion of the total punitive damages approved by the court.

tive damages would be litigated. The district court held that the Plaintiffs would be allowed to produce evidence at trial of pattern or practice discrimination, and Circuit City would be permitted to fully defend the pattern or practice claim. If there was a finding of pattern or practice discrimination, the district court stated that Circuit City would be collaterally estopped from denying the existence of such discrimination at subsequent trials. Finding this method of case management to be more fair and efficient, the district court decertified the class. However, the district court granted the Plaintiffs' motion to stay the order decertifying the class until the end of the trial.

On October 23, 1996, the district court granted Circuit City's motions for summary judgment as to the claims of N. Smith, S. Smith and Spencer. Thus, nineteen claims by six Plaintiffs went to trial. Trial commenced on October 28, 1996, and lasted for one month. At the beginning of the trial, the district court re-emphasized the procedural posture of the case, stating "[t]his is a case involving six individual plaintiffs. . . . Don't misunderstand." (J.A. 2042-43).

The majority of Plaintiffs' case focused on the pattern or practice of discrimination that allegedly resulted from Circuit City's insufficiently regimented management practices. The Plaintiffs presented the testimony of twenty-three African-American employees or former employees at Circuit City's HQ. Many of these witnesses testified they left Circuit City because they were frustrated by seeing whites get promoted while they stayed in non-managerial positions. Many witnesses testified they (1) often learned of promotions only after white co-workers had been selected by a white supervisor without posting or otherwise advertising the existence of the opportunity; (2) were ignored or intimidated for complaining about promotion procedures; (3) feared retaliation if they used Circuit City's "open door" procedures; (4) were subjected to racial slurs from their supervisors, or to remarks evi-

dencing a corporate culture of stereotypical thinking and racial animus; and (5) received lower performance ratings, making them then ineligible for promotions, after Circuit City learned of their involvement in this action.

Plaintiffs also presented at trial the testimony of a statistical expert, Dr. Andrew Harless, a labor economist. In his written report and testimony during the trial, Harless opined that: (1) the promotion rates for black employees at HQ from April 1992 through December 1995 were substantially lower than the promotion rates for similarly-situated white employees; and (2) those differences were at a statistically significant level well beyond that normally applied in academic and scientific research. Circuit City introduced its own statistical experts, Drs. Joan Haworth and Peter Kolesar, who refuted Harless' conclusions, and opined that his statistics showed no evidence of racial discrimination.

At the close of the Plaintiffs' case, Circuit City moved for judgment as a matter of law on the claims of the remaining six Plaintiffs and the issue of whether Circuit City had engaged in an intentional pattern or practice of racial discrimination. The district court granted Circuit City's motion for judgment as a matter of law on the claims of P. Smith, Fleming and Stokes, but denied their motions with regard to the claims by Lowery, Peterson, and McKnight. As for the pattern or practice issue, the district court held that it was "a classic situation where a jury needs to resolve the matter." (J.A. 2824).

On instructing the jury, the district court stated that the jury had to resolve the pattern or practice question before considering whether any of the specific claims of discrimination had been established. The district court submitted a special verdict form to the jury containing twenty-four questions. The first question inquired whether the jury found that Circuit City had engaged in a pattern or practice of racial discrimination in promotions against

its former and present African-American employees at its Richmond, Virginia headquarters. The district court instructed the jury that, if they answered the question in the affirmative, they were permitted—but not required—to infer that individual promotion decisions were affected by the pattern or practice. The special verdict form then asked whether Circuit City had discriminated against the three remaining Plaintiffs in fifteen claims for discrimination as to promotion. Finally, the district court entered an order lifting the stay of its earlier decertification order.

After deliberating for two and one-half days, the jury returned a verdict on December 2, 1996. The jury unanimously found that (1) Circuit City had engaged in a pattern or practice of racial discrimination; (2) Circuit City had promoted Bell over Lowery because of race; and (3) Circuit City had promoted Whalen and Ramos over Peterson because of race. However, the jury rejected all of McKnight's claims, Lowery's other two claims, and Peterson's other eight claims. In all, the jury found in favor of the Plaintiffs on three of fifteen claims.

On Lowery's successful claim, the jury awarded her $12,500 in economic and compensatory damages and $225,000 in punitive damages. On Peterson's two successful claims, the jury awarded her $4,200 in economic and compensatory damages and $47,000 in punitive damages. On December 3, 1996, the district court entered judgment, including a judgment in favor of Plaintiffs on a pattern or practice claim. On March 12, 1997, the district court denied Circuit City's post trial motion to set aside the award of economic, compensatory and punitive damages or, in the alternative, for a remittitur, and denied Circuit City's renewed motion for judgment as a matter of law.

After a hearing on Plaintiffs' motion for a permanent injunction, the district court imposed a permanent in-

junction which: (1) prohibited Circuit City from engaging in any act or practice that has the purpose or effect of discriminating against any African-American employee at HQ because of his or her race; (2) required Circuit City to promote persons at HQ without regard to their race on the basis of objective, job-related and racially neutral standards; (3) prohibited Circuit City from taking "any adverse employment action against any African American employee or prior employee" (J.A. 772); (4) required Circuit City to create and staff a Department of Diversity Management, the Director of which would be principally responsible for insuring that Circuit City complied with the terms of the injunction, and the hiring of whom would be subject to comment by the Plaintiffs and court approval; (5) required Circuit City to develop within ninety days a program of diversity management, including methods and procedures to be used to prevent and eliminate discrimination with respect to promotions; and (6) required Circuit City to develop within ninety days of the Director's hiring a revised program for promotions at HQ, subject to comment by the Plaintiffs and approval, modification or rejection by the district court.

The district court set forth specific requirements that the new promotion programs must meet, including: (1) the use of common, written procedures and guidelines governing promotion selections; (2) the analysis of job openings to identify the criteria for selection; (3) the preparation of position descriptions; (4) the posting and dissemination to all HQ employees of notices of all job vacancies; (5) the keeping of records of all promotions, including the race of each applicant; (6) the review by the Director of Diversity of all promotion recommendations; (7) the establishment of career development and mentoring for all African-American employees at HQ; (8) the monitoring and measurement of the performance of all promoters; (9) the revision of procedures for granting merit reviews of all HQ employees; (10) the revision of procedures to handle racial discrimination complaints;

(11) the creation of a new diversity management training program for all promoters. The district court also required various and detailed reports from Circuit City's new Diversity Director.

In a separate section of the injunction, Section B, the district court ordered Circuit City to promote Lowery immediately to the position of Supervisor of Management Recruiting, or an equivalent position, and pay her the difference in salary and benefits that she would have earned between the date of the jury verdict and the date of her promotion.[3]

The district court retained jurisdiction of the case for at least five years, and thereafter for as long as would be required to carry out the purposes of its order. Breach of the injunction would entitle the Plaintiffs to file a motion for enforcement and for appropriate sanctions. Finally, Plaintiffs' counsel would be allowed to apply to the court quarterly for fees and expenses reasonably incurred in the monitoring and enforcement of the order.

Circuit City filed a timely appeal from the district court's judgment on the pattern or practice claim, the award of economic, compensatory and punitive damages to Lowery and Peterson, the injunction, and the denial of Circuit City's renewed motion for judgment as a matter of law. The Plaintiffs then cross-appealed from the district court's order decertifying the class action, the district court's orders dismissing the claims of the other six Plaintiffs, and the entry of judgment in favor of Circuit City on McKnight's claims. In addition, the Plaintiffs ask this Court to amend the pattern or practice judgment to include the entire class.

On June 25, 1997, the district court granted Plaintiffs' application for attorneys' fees and costs in the amount of

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[3] Because Peterson had left FNANB, the Plaintiffs' motion for a permanent injunction did not ask for, and the injunction did not grant, similar relief for Peterson.

$3,911,504. Relying mainly on its finding that Plaintiffs succeeded on the pattern or practice claim, "[a] significant issue in litigation which 'achieve[d] some of the benefit the parties sought in bringing suit,' " the district court stated that Plaintiffs obtained excellent results in their civil rights suit and their attorneys should recover a full compensatory fee. (J.A. 4370) (quoting *Hensley v. Ekerhart*, 461 U.S. 424, 433 (1983)). The district court rejected Circuit City's argument that, because only two of the original eleven Plaintiffs prevailed in the suit, and because the amount of damages awarded on only three out of fifty claims was very small, an award of attorneys' fees and costs of nearly $4 million was excessive. The district court made some minor adjustments in the number of hours billed, but essentially awarded full fees and costs to the Plaintiffs. Circuit City timely appealed this award of attorneys' fees and costs.

On July 15, 1997, we granted Circuit City's emergency motion to stay, pending appeal, all provisions of the injunction except those in Section B relating to Lowery.

On January 7, 1998, the district court granted a motion by Lowery to compel Circuit City's compliance with Section B of the injunction. The district court concomitantly ordered Circuit City to pay Lowery's "lawyers their reasonable attorneys' fees and costs incurred in connection with th[e] motion to compel compliance." (Supplemental J.A. 8). The district court then directed Lowery's attorneys to file fee and cost requests along with supporting documentation by January 16, 1998. Circuit City filed a notice of appeal from the district court's January 7, 1998 order.[4]

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[4] After briefing and oral argument in the instant consolidated appeal, on July 21, 1998, the district court ordered Circuit City to pay Lowery $46,075.00 in attorneys' fees and costs in connection with her motion to compel Circuit City's compliance with Section B of the injunction. This fee and cost award is the subject of a separate appeal that is not part of the instant appeal.

II

We first consider the Plaintiffs' cross-appeal of the district court's order decertifying their class action. We review a district court's decision to decertify a class action for abuse of discretion. *See Kidwell v. Transportation Communications Int'l Union*, 946 F.2d 283, 305 (4th Cir. 1991) (citing *Stott v. Haworth*, 916 F.2d 134, 139 (4th Cir. 1990); *Zimmerman v. Bell*, 800 F.2d 386, 389 (4th Cir. 1986)). Issues such as class action manageability are "properly committed to the district court's discretion, because that court generally has a greater familiarity and expertise with the practical and primarily factual problems of administering a lawsuit than does a court of appeals." *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993) (internal qoutation marks and ellipses omitted).

The Plaintiffs first argue that the district court erroneously decertified the class action because, if the four requirements of Federal Rule of Civil Procedure 23(a) are satisfied, the district court is not at liberty to consider other factors in deciding whether to certify a class. In effect, Plaintiffs argue that, once the requirements of Rule 23(a) are met, the district court loses its discretion to certify or decertify the class. This argument, however, does not comport with either the language of Rule 23 or this court's precedent. First, Rule 23 states that an action "may" be maintained as a class action if the listed requirements are met. *See* Fed. R. Civ. P. 23(a) and (b). The Rule does not say that, once the requirements are met, the district court "must" certify and maintain the suit as a class action.

Second, we have previously held that district courts have broad discretion in deciding whether to certify a class. *See In re Catawba Indian Tribe*, 973 F.2d 1133, 1136 (4th Cir. 1992). This broad discretion necessarily implies that the district court may appropriately consider factors other than those listed in Rule 23 in determining

whether to certify a class action. *See, e.g., Amchem Prods., Inc. v. Windsor,* 117 S. Ct. 2231, 2248 (1997) (stating that settlement is relevant to class certification); *General Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 159 (1982) (considering principles of efficiency and economy of litigation); *Califano v. Yamasaki,* 442 U.S. 682, 702-03 (1979) (stating that, when the district court is asked to certify a nationwide class, it is appropriate to consider both whether nationwide relief is appropriate and whether such a class would improperly interfere with other litigation in other judicial districts); *Boughton v. Cotter Corp.,* 65 F.3d 823, 827 (10th Cir. 1995) (stating that, in a case where injunctive relief was requested and certification was otherwise legally permissible under Rule 23 (b)(2), the district court did not abuse its discretion in refusing to certify the class because the relief sought was nonetheless primarily money damages); *In re A.H. Robins Co.,* 880 F.2d 709, 740 (4th Cir. 1989) (holding it was proper in determining certification to consider whether certification would "foster settlement of the case with advantage to the parties and with great saving in judicial time and services"), *abrogated on other grounds by Amchem,* 117 S. Ct. at 2247-48. *See also* 7B Charles Alan Wright et al., *Federal Practice and Procedure* § 1785, at 119, 122 (2d ed. 1986 and Supp. 1998) (stating that, in exercising the "broad discretion" to decide whether to allow a suit to proceed as a class action, some courts have ruled it is appropriate to take account of considerations not expressly addressed in Rule 23, including manageability in Rule 23(b)(2) cases) (collecting cases, including *In re A.H. Robins, supra*). *But see Forbush v. J.C. Penney Co.,* 994 F.2d 1101, 1105 (5th Cir. 1993) ("[Q]uestions of manageability and judicial economy are . . . irrelevant to 23(b)(2) class actions."). If, as the district court found here, other factors exist that militate against trying the case as a class action, it is appropriate for the district court to decertify the class. *See Stott,* 916 F.2d at 139 ("[A]n order certifying a class must be reversed if it becomes apparent, at any time during the

pendency of the proceeding, that class treatment of the action is inappropriate.") (citing *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 273-76 (4th Cir. 1980)). As set forth above, the district court has such broad discretion to certify a class because it is intimately familiar with such practical and factual intricacies of the suit. *See Central Wesleyan College*, 6 F.3d at 185.

Here, the district court had legitimate concerns that trying the suit as a class action would be unwieldy and unfair to Circuit City. First, the district court rightly questioned whether the Plaintiffs' proposed trial procedure would be an efficient or accelerated method of disposing of the claims. While holding two-week trials with separate juries on the class members' claims would have doubtlessly been more efficient and accelerated than bringing dozens of individual suits, that fact does not require the district court to certify a class action that would nevertheless be inefficient and cumbersome.[5] Second, the district court had legitimate concerns about fairness. The Plaintiffs' proposed trial method would allow the Stage 1 jury to determine punitive damages before the Stage 2 jury hears evidence of actual harm to the class members or Circuit City's proffered justifications for its adverse employment decisions. It would have been entirely possible that the evidence adduced in Stage 1 would have resulted in stiff punitive damages, while the evidence of actual harm presented in Stage 2 would have shown that Circuit City's actions were not sufficient to merit compensatory damages, or even egregious enough to have

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[5] We note that, in affirming the district court's decertification of the class due to concerns about case manageability, we do not mean to imply that the factors for certifying a Rule 23(b)(3) class should be imported into Rule 23(b)(2) classes. Nevertheless, because efficiency is one of the primary purposes of class action procedure, *see Falcon*, 457 U.S. at 159 (citing *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974)), we hold that in appropriate circumstances a district court may exercise its discretion to deny certification if the resulting class action would be unmanageable or cumbersome.

merited punitive damages. We cannot conclude that such concerns led the district court to abuse its discretion in decertifying the class.

The Plaintiffs also argue, as do several of the *amici curiae*, that decertification was inappropriate because (1) the statute of limitations began running against the class members; (2) each former class member will now have to retain counsel and file a separate suit; (3) class action procedure is an important tool for the effective enforcement of civil rights laws; and (4) courts routinely certify Title VII classes under Rule 23(b)(2). Similarly, *amici* NAACP and the EEOC argue that Rule 23(b)(2) was intended to facilitate the bringing of class actions in civil rights cases, and that class actions are a favored means for both ending systemic discrimination and obtaining full relief for all the victims of such discrimination. Although these statements may be absolutely true, they are beside the point. If we were to hold these factors to be the predominant considerations for certifying a civil rights class, then nearly every suit alleging a pattern or practice of discrimination would be certified for class action because these factors would exist in nearly every case. However, the Supreme Court has rejected the proposition that merely alleging a pattern or practice of discrimination automatically entitles plaintiffs to class certification. *See Falcon*, 457 U.S. at 155-57; *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405-06 (1977).

In conclusion, we hold that the district court's concerns about fairness and efficiency did not lead it to abuse its discretion in decertifying the class action.

III

Circuit City next argues that the judgment of the district court with respect to the Plaintiffs' § 1981 and Title VII claims must be reversed because individuals do not have a private, non-class cause of action for pattern or practice discrimination and the Plaintiffs failed to offer either direct evidence of discrimination or circumstantial

evidence of discrimination sufficient to establish claims of disparate treatment under the *McDonnell Douglas* method of proof. The Plaintiffs, on the other hand, argue that an individual cause of action alleging a pattern or practice of discrimination by the employer should be permitted because "[t]here is absolutely no logical or legal reason why *any* plaintiff cannot prove his disparate treatment theory in a § 1981 and/or a Title VII claim" through a pattern or practice claim and, therefore, the method of proof set forth in *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), is applicable. (Appellees' Br. at 15) (emphasis in original). We agree with Circuit City that individuals do not have a private, non-class cause of action for pattern or practice discrimination under § 1981 or Title VII. We further agree, with the exception of plaintiffs Lowery and Peterson, that the Plaintiffs failed to offer either direct evidence of discrimination or circumstantial evidence of discrimination sufficient to establish claims of disparate treatment under the *McDonnell Douglas* method of proof.[6]

Section 707 of Title VII, 42 U.S.C. §2000e-6, allows the federal government, either through the EEOC or through the Attorney General, to bring a civil action directly against an employer charging systematic discrimination against a protected group. In these cases, the government has to demonstrate that there exists "a pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII] . . . ." 42 U.S.C. § 2000e-6(a). The government's burden in a pattern or practice action is to "prove more than the mere occurrence of isolated or accidental or sporadic discriminatory acts.

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[6] Our case law recognizes that "the framework of proof for disparate treatment claims—that is, whether the employer intentionally discriminated against the employee—is the same for actions brought under Title VII or § 1981." *Mallory v. Booth Refrigeration Supply Co.*, 882 F.2d 908, 910 (4th Cir. 1989). Accordingly, our discussion below regarding the Plaintiffs' Title VII claims encompasses their claims under § 1981.

It ha[s] to establish by a preponderance of the evidence that racial discrimination [is] the company's standard operating procedure—the regular rather than unusual practice." *Teamsters*, 431 U.S. at 335-36 (footnote and internal quotation marks omitted). At this initial "liability" stage, the government is not required to prove that any particular employee was a victim of the pattern or practice; it need only establish a *prima facie* case that such a policy existed. *See id.* at 360. Once established, the burden of proof then shifts to the employer to demonstrate that the government's showing of a pattern or practice of discrimination is either inaccurate or insignifiant. *See id.* If the employer fails to rebut the government's *prima facie* case, the resulting finding of a discriminatory pattern or practice gives rise to an inference that all employees subject to the policy were its victims and are entitled to appropriate remedies. *See id.* at 362. Such a finding justifies an award of prospective relief, but the government may also seek individual relief for the victims of the discriminatory practice. *See id.* at 361. In such a case, the district court usually conducts proceedings in a "remedial" stage to determine the scope of individual relief. To obtain relief for individual employees, the government must demonstrate that the employees were actual victims of the policy. *See id.* at 362. However, the burden still remains on the employer to prove that the employee was denied an employment opportunity for lawful reasons. *See id.* at 361-62.

Although § 707 applies to suits brought by the government, the *Teamsters* decision implicitly endorsed the application of pattern or practice principles and rules of proof to class action lawsuits brought by private parties. *See id.* at 357-60. The courts of appeals have seized on that endorsement and permitted pattern or practice class action suits using the *Teamsters* method of proof. *See, e.g., Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1559 (11th Cir. 1986); *Sledge v. J. P. Stevens & Co.*, 585 F.2d 625, 637 (4th Cir. 1978).

On the other hand, in a private, non-class action, where individual plaintiffs allege discrimination in violation of Title VII, the plaintiffs typically prove that discrimination by satsfying the shifting burden of proof scheme set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. A plaintiff attempting to prove a Title VII claim of discrimination with circumstantial evidence must first establish a *prima facie* case. *See id.* at 802. In order to establish a *prima facie* case of, for example, failure to promote, the plaintiff must show: (1) she is a member of a protected group; (2) she applied for the position in question; (3) she was qualified for the position; and (4) she was rejected for the position in favor of someone not a member of the protected group under circumstances giving rise to an inference of unlawful discrimination. *See Carter v. Ball*, 33 F.3d 450, 458 (4th Cir. 1994); *Alvarado v. Board of Trustees of Montgomery Community College*, 928 F.2d 118, 121 (4th Cir. 1991). In a case such as this, where the plaintiffs are alleging that they were passed over for promotions because they were black, the fourth prong can be satisfied by a showing that the positions were filled by white applicants. *See Carter*, 33 F.3d at 458. Once the plaintiff has established a *prima facie* case of discrimination, the burden of production shifts to the employer to rebut the plaintiff's *prima facie* case by articulating a legitimate, non-discriminatory reason for the adverse employment action. *See McDonnell Douglas*, 411 U.S. at 802. In a case such as the one before us, the employer may rebut the plaintiff's "*prima facie* case by demonstrating that the white selectee was better qualified for the position." *Carter*, 33 F.3d at 458. If the employer articulates a legitimate, non-discriminatory reason for the employment action, the plaintiff bears the burden of proving that the employer's articulated reason is a pretext for discrimination. *See id.*

At this point, the issue before us is whether individuals have a private, non-class cause of action for pattern or

practice discrimination and, thus, may avail themselves of the *Teamsters* method of proof. For the reasons stated below, we conclude that, although such plaintiffs may use evidence of a pattern or practice of discrimination to help prove claims of individual discrimination within the *McDonnell Douglas* framework, individual plaintiffs are not entitled to the benefit of the *Teamsters* method of proof.

The Supreme Court has never applied the *Teamsters* method of proof in a private, non-class suit charging employment discrimination. Rather, the Court has noted that there is a "manifest" and "crucial" difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination. *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984). In a class action pattern or practice case, the plaintiffs first litigate the common question of fact, i.e., whether the employer utilized a pattern or practice which discriminated against the class. *See id.* at 880. When the class plaintiffs prove the existence of a discriminatory practice, then that finding benefits them in the adjudication of individual claims by creating a presumption that the individual class members were victims of the discriminatory practice. *See Teamsters*, 431 U.S. at 361-62.

On the other hand, an individual plaintiff in a private, non-class action alleging employment discrimination is not litigating common questions of fact, but the discrete question of whether the employer discriminated against the plaintiff in a specific instance. *See McDonnell Douglas*, 411 U.S. at 802. Evidence of a pattern or practice of discrimination may very well be useful and relevant to prove the fourth element of a *prima facie* case, that the individual's adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination, *see Carter*, 33 F.3d at 458; *Alvarado*, 928 F.2d at 121, or that the employer's articulated reasons

for the adverse action was merely pretext, *see Carter*, 33 F.3d at 456, or to establish the plaintiff's ultimate burden. However, statistics alone cannot establish a *prima facie* case of individual disparate treatment, for all four elements of a *prima facie* case must be established. *See Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1131-32 (11th Cir. 1984). The Supreme Court has never indicated that an inference of discrimination should arise in an individual case until the plaintiff has proved *all* elements of a *prima facie* case. *See McDonnell Douglas*, 411 U.S. at 802.

We also note that class action pattern or practice suits differ from disparate treatment suits in the nature of their remedies. Class action pattern or practice suits primarily seek to redress widespread discrimination and the harm suffered by the group of individuals subjected to that discrimination. Accordingly, the relief typically sought in class action pattern or practice suits is injunctive and may include such aspects as, for example, affirmative action plans and the altering of a seniority system. *See* 1 Larson, *Employment Discrimination* § 8.01[3], at 8-14 (2d ed. 1994). The need for such remedies can be determined without referring to matters such as the qualifications of a particular employee. On the other hand, in a private, non-class disparate treatment case, the plaintiff seeks to remedy individual harm. Accordingly, the relief typically sought involves reinstatement, hiring, back-pay damages, etc. Such remedies typically require the examination of the circumstances surrounding a single employment action involving the plaintiff.

In sum, because the Supreme Court has never applied the *Teamsters* method of proof in a private, non-class action for employment discrimination, and because the nature of the proof and remedies in class and government pattern or practice actions differs vis-a-vis private, non-class actions, we decline to give individual plaintiffs a pattern or practice cause of action or allow them to use the *Teamsters* method of proof.

The relevant case law on the subject supports our conclusion. In *Scarlett v. Seaboard Coast Line R.R.*, 676 F.2d 1043 (5th Cir. 1982), the Fifth Circuit rejected the plaintiffs' suggestion that they could use evidence of systematic discrimination *alone* to prove instances of individual discrimination, reasoning that individuals proceeding on circumstantial evidence of discrimination under Title VII must prove the elements of a discriminatory hiring claim as set forh in *McDonnell Douglas. See id.* at 1053. Despite evidence of a pattern or practice of discrimination, the court of appeals held that the plaintiffs did not have a claim because they had failed to prove all the elements of an individual claim. *See id.* Later, in *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207 (5th Cir. 1995), the Fifth Circuit stated, in the context of a private, non-class action suit, that "[a] 'pattern or practice' claim is not a separate cause of action, but merely another method by which disparate treatment can be shown." *Id.* at 1219. *See also Babrocky v. Jewel Food Co.*, 773 F.2d 857, 866-67 n.6 (7th Cir. 1985) ("Plaintiffs' use of 'pattern-or-practice' language . . . seems to be misplaced, since such suits, by their very nature, involve claims of class-wide discrimination, and the five plaintiffs, while attacking policies that would have affected all of Jewel's women employees as a class, have stated only their individual claims, not a class action.").

Cox and *Davis v. Califano*, 613 F.2d 957 (D.C. Cir. 1979), cases cited by the Plaintiffs, are not in conflict with our holding. In *Cox*, the district court decertified the class, but nevertheless tried the individual plaintiffs' pattern or practice claims. *See Cox*, 784 F.2d at 1558. On appeal, the Eleventh Circuit approved of the pattern or practice claims, but only after it held that the district court had erroneously decertified the class. *See id.* at 1558-60. Thus, the pattern or practice claims in *Cox* were appropriately brought in the context of a class action case. *Cox*, does not, however, stand for the proposition

that individual plaintiffs may bring pattern or practice claims.

In *Davis*, the District of Columbia Circuit stated that "[s]tatistical proof may alone be used, without presentation of specific instances of discrimination, to establish a *prima facie* case of employment discrimination." *Davis*, 613 F.2d at 962. However, the court remanded the case for determination of whether the employee was denied promotion for lawful reasons and, presumably, for determination whether those reasons were merely pretextual. *See id.* at 966. Although we disagree with *Davis* that statistical evidence alone may be used to establish a *prima facie* case of employment discrimination, *see Carmichael*, 738 F.2d at 1131-32, *Davis* is consistent with our conclusion that private, non-class actions alleging employment discrimination would still follow the *McDonnell Douglas* proof scheme. "Even *Davis* . . . recognizes that once statistics have established a pattern of discrimination, each individual plaintiff must still establish that he has been denied an employment benefit in order to recover for particularized injuries." *Id.* at 1132 (internal alterations, ellipses and quotation marks omitted).

Because the Plaintiffs cannot avail themselves of the *Teamsters* method of proof, and because they do not have direct evidence of discrimination, we now turn to consider whether they established their disparate treatment claims under the *McDonnell Douglas* method of proof. We have carefully examined the evidence in the record and conclude that Plaintiffs Spencer, N. Smith, P. Smith, and Fleming failed to establish a *prima facie* case of discrimination under that method of proof. Additionally, S. Smith failed to establish a *prima facie* case with respect to one of her two separate claims. Spencer alleged she was twice passed over for Maintenance Coordinator because of her race. However, she did not present sufficient evidence that she applied for the position, or that

she had the minimum qualifications necessary for the position. Both N. Smith and P. Smith alleged they were denied promotions to Customer Service Supervisor due to their race. However, they both failed to prove they were qualified for the position because neither had ever served as Customer Service Assistant Supervisor as Circuit City required. Fleming alleged he was denied a promotion to Real Estate Relocation Coordinator in the Real Estate Department because of his race. However, he failed to prove he was qualified for the position because he never obtained his real estate license as Circuit City required for that position. No reasonable evidence was introduced showing that the licensing requirement was imposed as a pretext for racial discrimination. S. Smith alleged she was discriminatorily passed over for promotion to Division Accounting Analyst. However, the record is clear that she voluntarily withdrew her application and thus did not apply for the position. There is no indication it was futile to apply or that Circuit City somehow prevented her from applying. We therefore, affirm the grant of summary judgment and judgment as a matter of law against these Plaintiffs.

As for Stokes' claim and S. Smith's remaining claim, even if they established a *prima facie* case, we conclude below that they failed to demonstrate that Circuit City's articulated reasons for passing them up for promotion were pretextual. Stokes alleged that Circuit City failed to promote him to a position of Supervisor in the Merchandise Payables Department because of his race. Circuit City articulated that Kevin Gremer was selected for the position because he was more qualified than the other applicants. Critically, while Stokes offered evidence of his qualifications, including his experience as a Specialist in the Merchandise Payables Department, he failed to offer any evidence that his qualifications were superior to Gremer's qualifications. Indeed, Stokes fails to offer any evidence of Gremer's qualifications or lack thereof. The

mere assertion that Stokes was more qualified than Gremer is insufficient to establish pretext. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (stating that plaintiff cannot rely on conclusory allegations to create factual dispute warranting trial); *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 456 (4th Cir. 1989) ("[A] plaintiff's own assertions of discrimination in and of themselves are insufficient to counter substantial evidence of legitimate nondiscriminatory reasons for an adverse employment action.").

S. Smith alleged she was passed over for promotion to Treasury Analyst because of her race. The job posting stated that the Treasury Department was "seeking a highly motivated and achievement-oriented team player with excellent communication and organizational skills." (J.A. 500). In addition, "[s]trong analytical and decision-making skills [were] essential" for the position. *Id.* After interviewing S. Smith, the promoter, Shelly Steadman, found that S. Smith's position as Specialist in the Merchandise Payables Department had not prepared her for the position of analyst in the Treasury Department. In addition, Steadman felt that S. Smith did not communicate with enough assertiveness. Steadman interviewed two other applicants—one white and one African-American—but felt that neither of them possessed the abilities needed for the position, either. After failing to fill the position, Steadman hired Janet Klingenburg as a temporary employee to prepare some reports that were in urgent need of completion. Klingenburg had a degree in accounting and was in the process of getting her accreditation as a Certified Public Accountant (CPA). She had been working as an actuary and, thus, possessed many of the analytical skills needed for the Treasury Analyst position. After preparing the report in a manner Circuit City described as "excellent," and demonstrating her assertiveness and communication, analytic and computer skills, Circuit City offered Klingenburg the Treasury Analyst position.

Circuit City stated that Klingenburg received the Treasury Analyst position because she was more qualified than S. Smith. S. Smith's response was that: (1) Klingenburg was new to Circuit City and, thus, not familiar with the Treasury Department; (2) CPA certification was not one of the posted job requirements; and (3) "assertiveness" was merely a subjective qualification used to discriminate against her because of her race. These responses did not sufficiently demonstrate that Circuit City's articulated reasons for selecting Klingenburg were pretextual. First, the job posting did not require familiarity with the Treasury Department, so it was not inappropriate to hire from outside Circuit City. Second, although the position did not require CPA certification, the fact that Klingenburg was seeking such certification demonstrated that she was a "highly motivated and achievement-oriented" person as the job posting requested. (J.A. 500). Finally, assertiveness is an inherent aspect of "excellent communication . . . and decision-making skills." *Id.* We therefore conclude that S. Smith failed to demonstrate that Circuit City's articulated reasons for rejecting her in favor of Klingenburg were merely pretextual.

Although a plaintiff in a Title VII action may sometimes be able to use statistical evidence of a pattern or practice of discrimination to help establish pretext, this is not such a case. Dr. Harless' statistical analysis of promotions at Circuit City failed to adequately control for factors other than race that could account for the disparity in promotions. One notable omission from Harless' study was the factor that educational level had on promotions at Circuit City. Even if a given educational level was not required for all positions at Circuit City, the record is clear—and common sense dictates—that for many positions educational background was crucial. However, the evidence in this case showed that, while fifty-five percent of HQ employees had college degrees, only thirty-three percent of Circuit City's African-American HQ employees were college graduates. Despite such a large dis-

parity in the educational levels of employees at Circuit City's HQ, Harless failed to consider how educational level affected promotions. We conclude that the failure to consider this factor is sufficiently serious so as to weaken the statistical study's probativeness. *See Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (Brennan, J., concurring in part, adopted by the full Court).

In sum, we affirm the grant of summary judgment against S. Smith, Spencer and N. Smith, and affirm the grant of judgment as a matter of law against Stokes, Fleming and P. Smith.[7]

IV

Next, Circuit City complains that several actions taken by the district court in managing discovery precluded Circuit City from establishing an effective defense. We disagree. We review a district court's actions in managing discovery for abuse of discretion. *See Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*, 43 F.3d 922, 929 (4th Cir. 1995).

A

After the district court certified the class action, the parties moved for a clarification of the circumstances under which Circuit City could communicate directly with its African-American employees and former employees. The district court entered an order on May 31, 1996, limiting Circuit City's communications with African-

[7] Circuit City argues that several errors in the district court's instructions necessitate reversal of Lowery and Peterson's individual discrimination claims. Circuit City also argues there was insufficient evidence for the jury to find in favor of Lowery and Peterson on their individual claims of discrimination. We have thoroughly reviewed these assignments of error and find them to be without merit. Accordingly, we affirm the district court's judgment with respect to Lowery and Peterson.

American employees to non-litigation related matters, and prohibiting all other communications except with prior consent of class counsel or the district court. The order also prohibited discovery of class members other than the named Plaintiffs and those class members whom the Plaintiffs intended to call as witnesses at trial. The basis for the district court's limitations was Virginia Code of Professional Responsibility Disciplinary Rule 7-103, which prohibits attorneys from communicating with opposing parties except through opposing counsel. Circuit City complains that this limitation effectively barred Circuit City from communicating with African-American employees who wished to contradict the Plaintiffs' assertions, including employees who wanted to initiate the communication.

Although the district court's order limited *ex parte* communications between Circuit City and its African-American employees at HQ, the order also indicated that, if Circuit City wished to communicate with class members outside the given limitations, Circuit City could apply to the district court for permission to do so. Circuit City merely had to justify why the communication should be exempt from Rule 7-103. The record shows that Circuit City made several such motions, and that the district court readily granted the motions when Circuit City explained why it was necessary to do so. The district court did not, however, grant those motions when Circuit City failed to outline a sufficiently important need for an exception to Rule 7-103.

Circuit City points to no particular denial it alleges was erroneous, nor to any particular employee with whom it needed to communicate in order to establish an effective defense. Rather, Circuit City merely complains it was prohibited from communicating with any employee it wished. If there were employees with whom Circuit City needed to communicate, the procedures were available for Circuit City to gain permission to do so. The fact that Circuit City failed to utilize those procedures does

not mean that the district court's limitations on *ex parte* communications precluded Circuit City from establishing an effective defense. Furthermore, because Circuit City has failed to identify any prejudice which resulted from the district court's limitations on communications, any error in imposing those limitations was harmless.

B

Circuit City also claims it was precluded from establishing an effective defense because the district court refused to compel the discovery of certain information used by Plaintiffs' statistical expert, Dr. Harless. Circuit City wished to review the methods, data, sources, computer programs, data runs, and codes that Dr. Harless used in performing his statistical analysis of Circuit City's promotion decisions. In response to Circuit City's motion to compel disclosure of this information, the Plaintiffs demonstrated that the data runs, computer programs and codes used by Dr. Harless were produced and developed by other non-testifying consultants retained by the Plaintiffs. Because Circuit City did not demonstrate exceptional circumstances, the district court denied Circuit City's motion to compel discovery of this information. We hold that the district court did not abuse its discretion in refusing to compel this discovery.

Federal Rule of Civil Procedure 26(b) allows discovery of information held by non-testifying experts only upon a "showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." Fed. R. Civ. P. 26(b)(4)(B). Circuit City directs us to no place in the record where it made such a showing and, in any event, the record demonstrates that Circuit City was able to obtain sufficient information by other means. Harless submitted a detailed expert report as required by the rules, setting forth each of his opinions and providing supporting reasons and exhibits. Circuit

City was able to thoroughly examine Harless during his deposition about the bases of, and the methods used for, his analysis. In addition, Circuit City's statistical experts, Drs. Haworth and Kolesar, examined and refuted Dr. Harless' analysis. Given these facts, we cannot conclude the district court abused its "substantial discretion in managing discovery" by denying Circuit City access to this information. *See Lone Star Steakhouse,* 43 F.3d at 929.

In summary, we hold that the district court's limitations on communication with class members [8] and its refusal to compel discovery of Dr. Harless' data runs, computer programs, codes, etc., did not preclude Circuit City from establishing an effective defense.

V

Circuit City next argues that the district court erred in submitting the issue of punitive damages to the jury. We agree.

A plaintiff who brings a successful action under 42 U.S.C. § 1981 is entitled to equitable relief, compensatory damages and, "under certain circumstances," punitive damages.[9] *Stephens v. South Atlantic Canners, Inc.,* 848 F.2d 484, 489 (4th Cir. 1988) (citing *Johnson v. Railway Express Agency,* 421 U.S. 454, 459 (1975)). However, not every action under § 1981 warrants an award of punitive damages. *See id.* Punitive damages are only recoverable for conduct exhibiting "malice, an evil motive, or recklessness or callous indifference to a federally protected right." *Id.* (citing *Smith v. Wade,* 461 U.S. 30, 56 (1983)). It is an "extraordinary remedy," designed to punish and deter "particularly egregious conduct." *Stephens,* 848 F.2d at 489 (citing *City of New-*

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[8] The class was not decertified until the beginning of the trial.

[9] A plaintiff that successfully brings an action for violations of both § 1981 and Title VII may only recover damages under § 1981. *See* 42 U.S.C. § 1981a(a)(1).

port v. Fact Concerts, Inc., 453 U.S. 247, 268 (1981)). "Although any form of discrimination constitutes reprehensible and abhorrent conduct, not every lawsuit under section 1981 calls for submission of this extraordinary remedy to a jury." *Id.* at 489-90.

In our view, there is simply insufficient evidence in the record to conclude that Circuit City's conduct toward Lowery and Peterson was so egregious that it was appropriate to submit the issue of punitive damages to the jury. The record is clear that Lowery and Peterson had problems that, at least partially, led to their being passed up for promotion. In light of this evidence, the extraordinary remedy of punitive damages was not appropriate, notwithstanding the jury's finding that Circuit City did not promote Lowery and Peterson because of their race. We conclude that the district court erred in submitting this issue to the jury and, consequently, vacate the award of punitive damages.

VI

Circuit City next complains of the injunction imposed by the district court, arguing the injunction is impermissibly over-broad. We review the district court's grant of a permanent injunction for abuse of discretion. *See Lone Star Steakhouse*, 43 F.3d at 939. As we explain below, we affirm the portions of the injunction contained in Section B that relate to Lowery. However, because we conclude that the remaining portions of the injunction inappropriately grant what amounts to class-wide relief, we hold that the district court abused its discretion in granting that relief and vacate those portions.

We have explained that the standard to be applied by the courts of this circuit in determining the appropriate remedy for racial discrimination is that the plaintiff should be placed in as near a position as possible to where he/she would have been now had the discrimination not occurred. *See Pecker v. Heckler*, 801 F.2d 709, 711 (4th Cir. 1986). Being equitable relief, an injunction should

be no broader than necessary to achieve its desired goals. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Moreover, "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Id.* (citing *Yamasaki*, 442 U.S. at 702). Ordinarily, class-wide relief for disparate treatment discrimination is appropriate only where there is a properly certified class, *see Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989), although occasionally individual relief equates to class-wide relief, *see, e.g., Thomas v. Washington County Sch. Bd.*, 915 F.2d 922, 925-26 (4th Cir. 1990) (directing the district court to fashion what amounted to class-wide injunctive relief in a case where an individual plaintiff proved that the employer's hiring practices had a disparate impact on minorities). For several reasons, the district court's injunction violates these principles.

First, although the district court appropriately decertified the class action, the provisions of the injunction grant class-wide remedies. The injunction requires Circuit City to promote all persons at HQ without regard to their race, and requires Circuit City to set up a Department of Diversity Management and revise its program of promoting employees. To ensure that the provisions of the injunction are carried out, it includes labyrinthine provisions for reporting and enforcement. Many aspects of the new programs are subject to Plaintiffs' approval, for which Plaintiffs' counsel may apply quarterly for fees and expenses incurred in the monitoring and enforcement of the order. Oversight by the Plaintiffs and the district court would occur for at least five years, and possibly longer if it was deemed necessary to carry out the purposes of the injunction. Such sweeping remedies far surpass those needed—and are far more burdensome than needed—to provide the prevailing Plaintiffs with complete relief.

Second, the Director of the Department of Diversity Management is required to establish a career development and mentoring program for all African-American em-

ployees. Not only is this class-wide relief, but the record clearly shows that minorities other than just African-Americans are also employed by Circuit City. Third, the district court admits that the breadth of its injunction was due to the verdict in favor of the Plaintiffs on the pattern or practice claim. Because, as we hold above, individuals may not bring a claim of pattern or practice discrimination, this "claim" cannot support an injunction which grants such broad and sweeping relief.

Fourth, the order essentially enjoins Circuit City from committing further violations of federal civil rights laws. This is the sort of go-thy-way-and-sin-no-more provision which we invalidated in *Davis v. Richmond, Fredericksburg & Potomac R.R.*, 803 F.2d 1322 (4th Cir. 1986). The district court in that case enjoined the employer from "committing further violations of Title VII." *Id.* at 1328. We held that such an injunction impermissibly subjects a defendant to contempt proceedings for conduct unlike and unrelated to the violation with which it was originally charged. *See id.*

Fifth, the injunction permanently enjoins Circuit City from taking "any adverse employment action against any African American employee." (J.A. 772). On its face, therefore, the injunction would prevent Circuit City from taking an adverse employment action against an African-American employee, even if the employee indisputably merited the adverse action and the action was undeniably nondiscriminatory.

The injunction's provisions in Section B relating to Lowery, on the other hand, are broad enough to provide her with complete relief without being overly burdensome or expansive. These provisions require Circuit City to promote Lowery to the position of Supervisor of Management Recruiting or an equivalent position, and to pay her the difference in salary between what she earned and what she would have earned had she been appropriately promoted. In other words, these provisions place Lowery in

as near a position as possible to where she would be now had the discrimination not occurred. *See Pecker*, 801 F.2d at 711. We, therefore, affirm the provisions in Section B of the injunction relating to Lowery, but vacate all other portions of the district court's injunction. We also affirm the district court's January 7, 1998 order granting Lowery's motion to compel Circuit City's compliance with Section B of the injunction and awarding Lowery her reasonable attorneys' fees and costs incurred in connection with that motion to be subsequently determined.

VII

Finally, Circuit City argued that the district court erroneously awarded in general the Plaintiffs attorneys' fees and costs. We review an award of costs and attorneys' fees for abuse of discretion. *See Reich v. Walter W. King Plumbing & Heating Contractor, Inc.*, 98 F.3d 147, 151 (4th Cir. 1996) (citing *Pierce v. Underwood*, 487 U.S. 552, 557-63 (1988)).

Our court has recognized that the most critical factor in calculating a reasonable fee award is the degree of success obtained. *See McDonnell v. Miller Oil Co.*, 134 F.3d 638, 641 (4th Cir. 1998) (quoting *Hensley*, 461 U.S. at 436). When the plaintiffs have achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. *See id.* (quoting *Hensley*, 461 U.S. at 436).

Here, the district court justified its award of full attorneys' fees and costs on the Plaintiffs' success on their pattern or practice claim. However, because we hold above that individual plaintiffs may not bring a claim for pattern or practice discrimination, the jury's finding here cannot support a recovery of attorneys' fees for those Plaintiffs that did not otherwise succeed in this action. Furthermore, viewing the case as a whole, we conclude that the Plaintiffs in fact achieved a very low degree of success. The

Plaintiffs brought this suit as a class action, but the district court appropriately decertified the class action at the beginning of trial. The suit originally involved fifty claims filed by eleven Plaintiffs, but only fifteen claims of three Plaintiffs survived motions for dismissal, summary judgment and judgment as a matter of law. Of the fifty claims filed, the Plaintiffs prevailed on only three. In all, the Plaintiffs recovered only $16,700 in compensatory damages.

In light of the low degree of success the Plaintiffs enjoyed, we hold that district court abused its discretion in awarding the Plaintiffs all of their accrued attorneys' fees and costs amounting to nearly $4 million. *See McDonnell*, 134 F.3d at 641. We, therefore, vacate the award of attorneys' fees and remand to the district court for redetermination in light of this opinion.

VIII

In summary, for the reasons stated above, we: (1) affirm the district court's order decertifying the class action; (2) vacate the judgment entered on the claim for pattern or practice of discrimination; (3) affirm the grant of summary judgment against N. Smith, S. Smith, and Spencer, and the grant of judgment as a matter of law against P. Smith, Fleming and Stokes; (4) affirm the verdicts in favor of Lowery and Peterson; (5) vacate the award of punitive damages; (6) affirm the provisions of the injunction relating to Lowery in Section B, but vacate all other provisions; (7) affirm the district court's grant of Lowery's motion to compel compliance with Section B of the injunction and award of reasonable attorneys' fees and costs in connection with that motion; and (8) vacate the general award of attorneys' fees and costs, and remand with instructions to redetermine costs and fees in a manner consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS

[Filed October 6, 1998]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1372 CA-95-964

LOWERY v. CIRCUIT CITY STORES

No. 97-1470 CA-95-964

MCKNIGHT v. CIRCUIT CITY STORES

No. 97-1917 CA-95-964

MCKNIGHT v. CIRCUIT CITY STORES

No. 98-1170 CA-95-964

LOWERY v. CIRCUIT CITY STORES

MANDATE

The judgment of this Court dated 9/14/98 takes effect today.

PATRICIA S. CONNOR
CLERK

APPENDIX B

[Filed Jun. 25, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action Number 3:95C-964

SHELBY MCKNIGHT, *et al.*,
Plaintiffs,

v.

CIRCUIT CITY STORES, INC.,
Defendant.

MEMORANDUM OPINION

THIS MATTER is before the Court on a motion by defendant Circuit City Stores, Inc. ("Circuit City") for a stay of this Court's injunctive relief Order entered on March 12, 1997 ("Injunctive Order"). Circuit City moves for this stay pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, and asks this Court to suspend the Order pending appeal. In the alternative, if the Court denies this motion, Circuit City requests that the Court issue a temporary stay "until the Fourth Circuit has had an opportunity to rule on the emergency stay motion that Circuit City intends to file within 24 hours of any adverse decision by this Court." Circuit City also petitions the Court to stay the Injunctive Order as it relates specifically to Renee Lowery. For the reasons stated herein, the Court will DENY Circuit City's motion for a stay of the Injunctive Order in its entirety and as it relates to Renee

Lowery. Additionally, the Court will DENY Circuit City's request for a temporary stay pending the appeal of the instant Order denying its motion for a stay.

BACKGROUND

On December 2, 1996, after a month-long trial, the jury in this case returned a unanimous verdict finding that (1) Circuit City engaged in a pattern or practice of race discrimination; (2) Circuit City wrongfully denied plaintiff Renee Lowery a promotion to the position of Management Recruiting Supervisor in October 1994; and (3) Circuit City wrongfully denied Lisa Peterson promotions to Assistant Supervisor positions in November 1994 and December 1994. The jury awarded Ms. Peterson and Ms. Lowery $288,700 in compensatory and punitive damages. And on March 12, 1997, after the issue was fully briefed and the parties were heard, the Court entered a permanent injunction enjoining Circuit City from further discrimination and ordering it to create a promotion structure targeted at preventing further racial discrimination at the company.

On March 17, 1997, Circuit City filed a notice of appeal and a motion requesting the Court to enter a stay of its Injunctive Order pending appeal. On March 19, 1997, the Court, without ruling on Circuit City's motion for a permanent stay, entered a temporary stay of the Injunctive Order.

In short, Circuit City argues that the Court should stay its Injunctive Order pending appeal for the following reasons: (1) there is a strong likelihood that the novel legal questions at issue in an appeal could be resolved in favor of Circuit City; (2) the broad injunction ordered by the Court will irreparably harm Circuit City and its employees if enforced before the Court of Appeals rules on the issues presented; (3) a stay will not substantially harm the parties to this litigation; and (4) a balancing of public interests favors neither party.

As expected, plaintiffs respond that a stay is unwarranted in this case because (1) Circuit City is not likely to prevail on appeal; (2) Circuit City will not be irreparably injured by compliance with the Injunctive Order during the pendency of the appeal; (3) if a stay is granted, plaintiffs and hundreds of other African American employees at Headquarters are likely to suffer significant injury; and (4) a stay would be contrary to the public interest. As the motion is fully briefed by the parties, it is now ripe for decision.

ANALYSIS

Standard of Review

Rule 62(c) of the Federal Rules of Civil Procedure allows the trial court, in its discretion, to suspend an injunction during the pendency of an appeal. Circuit City and the plaintiffs agree that Circuit City is entitled to a stay only if it shows that: (1) it will likely prevail on the merits of the appeal; (2) it will suffer irreparable injury if the stay is denied; (3) other parties will not be substantially harmed by the stay; and (4) the public interest will be served by granting the stay. *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). However, the parties disagree as to the standard which the Court should apply in weighing these factors.

On the one hand, Circuit City urges use of a balancing test. *See Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 194 (4th Cir. 1977). That is, the Court would weigh the above factors, and if, on balance, the factors favor Circuit City, then the stay would be granted. Of course, the opposite is true as well. If, on balance, the factors favor the plaintiffs, then the Court would deny the stay. On the other hand, the plaintiffs urge the Court to a "strong showing" standard whereby Circuit City would need to make a strong showing as to *each* of the four factors in order for the Court to grant a stay.

After a review of the case law in this circuit, it seems that Circuit City has the best of this argument. As the Fourth Circuit explained in *Blackwelder, Long v. Robinson* was a "strong showing" case which "involved a stay-pending-appeal situation, in which the district court had *fully considered the merits of the controversy,* rendered its final decree, and refused the request for an interim stay." 550 F.2d at 194 (emhasis in original). The court went on to explain that a petitioner's burden in seeking injunctive relief is substantially greater on appeal than at the trial court level. *Id.* The *Blackwelder* court essentially concluded that the "strong showing" standard is an appellate standard which is inappropriate for use at the trial court level. *Id.*

Therefore, the Court finds that a balancing test is the most appropriate approach for deciding the instant motion to stay this Court's Injunctive Order.

The Likelihood Of Success

In support of its argument that it will likely prevail on the merits of the appeal, Circuit City puts forth two major contentions. First, it advances that "the propriety of this Court entering an across-the-board injunctive remedy specifically designed to benefit non-parties in the absence of a certified class action is a novel question in this Circuit." Second, it asserts that the jury should not have been permitted to make a pattern or practice finding in the absence of a certified class action.

At the outset, the Court disagrees with Circuit City's characterization of its Injunctive Order. It is not "specifically designed to benefit non-parties." Rather, the injunction is designed to remedy intentional racial discriminatory promotion practices at Circuit City Headquarters which were directed at the plaintiffs in this case, as found unanimously by a jury of eight persons in this case. The fact that the Injunctive Order has a positive impact on non-parties as well as the parties to this case is merely incidental.

Addressing Circuit City's first complaint, as the plaintiffs point out, the Fourth Circuit has approved of systemwide injunctive relief in a variety of discrimination cases, including cases in which there was no certified class. For example, even where a named plaintiff in a non-class action suit lost on her individual claim, the Fourth Circuit held that the district court should have entered systemwide injunctive relief. *Thomas v. Washington County Sch. Bd.*, 915 F.2d 922, 925 (4th Cir. 1990). This is because even though the plaintiff could not prove that she was individually discriminated against, she was able to prove that the employer was guilty of practices violating Title VII. *Id.* The Fourth Circuit noted the following:

> The fact that Thomas did not bring a class action is of no moment. In *Sanford v. R.L. Coleman Realty Co.*, 573 F.2d 173 (4th Cir. 1978), we held that it was unnecessary for an individual plaintiff, who is entitled to equitable relief, to amend the complaint to allege a class action in order to obtain an injunction against racial discrimination, saying:
>
> > This is so because the settled rule is that "whether plaintiff proceeds as an individual or on a class suit basis, the requested [injunctive] relief generally will benefit not only the claimant, but all other persons subject to the practice or rule under attack."

915 F.2d at 925 (citation omitted). The *Sandford* court further stated that "[s]ince the plaintiffs could receive the same injunctive relief in their individual action as they sought by the filing of their proposed class action, class certification was unnecessary in order to give the plaintiffs the injunctive relief they requested through class certification, assuming the facts of the case were sufficiently flagrant to support that relief." 573 F.2d at 178 (footnote omitted).

Thomas was decided in the context of a finding of disparate impact. However, the reasoning is equally applica-

ble in a case such as this one where the jury has found disparate treatment in the promotion practice at Circuit City Headquarters. The facts regarding Circuit City's promotion practices are sufficiently flagrant to support system-wide relief. Therefore, the plaintiffs in this case are entitled to injunctive relief as individuals without regard to whether there is a certified class or not.

In another Fourth Circuit case in which the individual plaintiff was unsuccessful, the court held that injunctive relief was still warranted. *Evans v. Harnett County Board of Education,* 684 F.2d 304, 306 (4th Cir. 1982). The Court stated the following:

> We cannot accept the board's contention that injunctive relief is barred because Evans neither certified this suit as a class action nor advanced a meritorious individual claim. An injunction warranted by a finding of unlawful discrimination is not prohibited merely because it confers benefits upon individuals who were not plaintiffs or members of a formally certified class. Nor is an injunction against discriminatory employment practices rendered inappropriate because the court dismissed Evans's claims. . . .

Id.

Thus, this Court's Injunctive Order is not contrary to the above-cited Fourth Circuit cases. In fact, because the Court's Injunctive Order is based on the jury's verdict in favor of Ms. Lowery and Ms. Peterson in addition to its finding of a pattern or practice of discrimination at Circuit City Headquarters, it stands on even stronger ground. If the Court of Appeals allows broad injunctive relief to be granted when the individual plaintiff fails on all of her claims, certainly it is proper to enter an injunction in response to plaintiffs who were successful on their individual claims as well as a pattern and practice claim. The bottom line is that the jury properly found that Circuit City's promotion practices violate Title VII in that

they unlawfully constitute intentional racial discrimination, and injunctive relief is an appropriate remedy under the law. The Court acknowledges that it decertified the class in this case for efficiency and fairness reasons. However, nothing in the precedent set by the Fourth Circuit precludes the Court's actions under these circumstances. Therefore, the Court concludes that the probability of success on appeal is not substantial based on Circuit City's argument that the injunction should not have been granted in the absence of class certification.

Likewise, in reviewing Circuit City's second contention that the pattern or practice claim should not have been presented to the jury absent class certification, the Court finds Circuit City's probability of success on appeal insubstantial. It is true that the Fourth Circuit has not expressly held that a pattern and practice claim may be tried by individual plaintiffs. However, none of the precedents set by the Fourth Circuit or the Supreme Court indicate that it is improper to do so.

The Court is in agreement with the plaintiffs. The rationale of *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267 (4th Cir. 1980), has no application here. *Stastny* did not hold that a pattern or practice claim may only be tried in a class action suit. This was not even an issue in the case. Even the most broad reading of *Stastny* indicates that the court simply held that the class should have been decertified at the conclusion of the trial because the plaintiffs had failed to establish the commonality requirement of Rule 23 of the Federal Rules of Civil Procedure. *Id.* at 276. Thus, the only reason that the separate pattern or practice claim could not go forward in *Stastny* is because of the failure to find sufficient commonality among the plaintiffs.

However, as this Court noted in its March 12, 1997 Memorandum Opinion denying Circuit City's motion for judgment notwithstanding the verdict, this Court found that

plaintiffs had shown sufficient commonality under Rule 23 to warrant class certification. When the Court decertified the class, it was only because of efficiency problems and fairness issues. The Court never reversed its finding of commonality among the plaintiffs in this action. Thus, even if *Stastny* is controlling in this instance, it is inapplicable to this case.

For these reasons, the Court concludes that Circuit City has failed to show that its probability of success on appeal is substantial.

The Harm Absent A Stay

Next, Circuit City argues, without the support of affidavits, that the "sweeping nature of the injunction ordered by the Court will irreparably harm [its] business operations, as well as [its] employees" if the stay is denied. Specifically, Circuit City contends that it will lose its competitive edge in the retail industry if it is required to immediately "revamp" its promotions process. This is allegedly because no company in Circuit City's retail market has adopted practices resembling those in this Court's Injunctive Order. Circuit City maintains that the "bureaucratic guidelines" required by the Injunctive Order have the potential to paralyze the promotion process and further limit Circuit City's ability to remain competitive.

Further, Circuit City asserts that its competitive position will be hampered because of what it calls a "bifurcated promotion system." This terminology refers to the fact that the Injunctive Order is directed only toward Circuit City's Headquarters, which makes up only 10 percent of its nationwide workforce. The remaining 90 percent of the workforce is unaffected by the Court's injunction. This argument is specious. Circuit City has maintained, throughout these proceedings that hiring at Headquarters is entirely separate from hiring in its numerous stores nationwide. The Court finds it incredible

that an adjustment to rid the company of its racial discriminatory promotion practices in 10 percent of its multi-billion dollar company will make the whole house of cards fall down. The Court is especially incredulous of this argument because the promotion practices at Headquarters are independent of those in the rest of the corporation.

The Court admits that implementation of the Injunctive Order will come at some cost to Circuit City. However, the Court does not accept the representation that the creation of non-discriminatory promotion practices will cause an enormous amount of irreparable damage to Circuit City. And, as the Court in *Long* stated,

> I do not minimize the cost, the inconvenience or the burdens which will be placed upon the defendants should they begin compliance with the order. However, "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."

432 F.2d at 980 (quoting *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

Additionally, Circuit City raises the notion that the Court's Injunctive Order imposes requirements which are equally as rigid and bureaucratic as the racial quotas in the injunction rejected by the Fourth Circuit in *Sledge v. J.P. Stevens & Co.*, 1976 WL 3791 (4th Cir. Sept. 30, 1976). Circuit City concludes that the Court's Injunctive Order amounts to a race-based guarantee of favorable treatment. The Court recognizes Circuit City's continued inability to accept the fact that a jury properly found that it discriminates based on race in its promotion procedures at its Headquarters. However, a proper finding of discrimination does not operate in a vacuum; there must also be a remedy. And Title VII provides for injunctive relief as a remedy.

Contrary to Circuit City's protestations, the Injunctive Order is not rigid, bureaucratic or a race-based guarantee

of favorable treatment. The injunction orders Circuit City to treat African Americans, not favorably, but equally in the promotion process at Headquarters. The procedures to be followed to eliminate the racial discrimination at Circuit City are well supported by the evidence at trial and the testimony of experts regarding the best methods used by most competitive companies to ensure racial equity in the promotion process. In essence, the Injunctive Order eradicates Circuit City's present overly-subjective and discriminatory promotion procedures and replaces them with objective, race-neutral procedures to be used in all promotions at Headquarters.

In sum, the Court's Injunctive Order merely requires Circuit City to comply with the law. As the plaintiffs highlight, it requires Circuit City to do little more than other companies complying with the law are presently doing. Hence, Circuit City has failed to persuade the Court that it will suffer any irreparable injury if the stay is denied.

The Harm If A Stay Is Granted

With regard to the third, *Long* factor, Circuit City claims that the plaintiffs will not be harmed by a stay of the Injunctive Order. It first explains that because Ms. Peterson is no longer employed by Circuit City, the injunction has no impact on her. This argument makes sense. But what the Court does not understand is how Circuit City can argue that a stay of the Injunctive Order will not adversely affect Ms. Lowery, who still works for Circuit City.

Ms. Lowery is an African American employee at Circuit City who has been found to have been illegally discriminated against based on her race. Ms. Lowery has the right to be free from intentional discrimination in the promotion process. Even though Ms. Lowery has received individual injunctive relief, she has a federally protected right to be free from discrimination in the promotion pro-

cess should she choose to further participate in that process during the pendency of the appeal in this case.

Additionally, the jury properly found the existence of a pattern or practice of intentional race discrimination in the promotion process at Circuit City Headquarters. The injunction, entered for the benefit of the plaintiffs in this case, has the effect of benefiting all African American employees at Headquarters who participate in the promotion process. To allow proven discrimination to continue at Circuit City any longer would be unconscionable.

Circuit City counters this argument and states that its African American employees will not be harmed if a stay is granted because it "already is under a legal obligation pursuant to the Civil Rights laws not to discriminate against any protected employee." Circuit City continues: "Moreover, any violation of those laws can be remedied through an enforcement action in the courts." These are all true statements, and the violation of those Civil Rights laws is exactly what this case has been about. A jury has already found Circuit City to have violated those laws, and the purpose of the Court's injunction is to remedy those infractions. Any further delay in correcting Circuit City's discriminatory practices will truly be harmful to the plaintiffs in this case.

The Public Interest

Circuit City maintains that there are two competing, and equally important public interests implicated by this request for a stay: (1) fostering the purposes of the Civil Rights laws through efficient enforcement and (2) limiting unnecessary judicial interference with the operation of private companies. *See, e.g., Thomas v. City of Evanston*, 636 F. Supp. 587, 590 (N.D. Ill. 1986) (recognizing the enforcement of Title VII as a public interest); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) ("[Title VII] was not intended to di-

minish traditional management prerogatives"). Asserting that the balance of these public interests favors neither party, Circuit City concludes that this *Long* factor has little, if any, significance in the Court's analysis.

The Court strongly disagrees. The Fourth Circuit has recognized that a party suing to enforce a federal statute is, "if only provisionally," aligned with the public interest. *Blackwelder*, 550 F.2d at 197. The plaintiffs have sued to enforce laws prohibiting employment discrimination, and notably, they were highly successful. Thus, the public interest weighs heavily in favor of plaintiffs in this case.

Even accepting the notion that "limiting the unnecessary judicial interference with the operation of private companies" is a valid public interest, the vindication of federal laws prohibiting intentional discrimination outweighs that interest. Moreover, no corporation has a "traditional management prerogative" to intentionally discriminate in the promotion process. Hence, the Court's Injunctive Order is not *unnecessarily* interfering with the operation of Circuit City Headquarters.

This Court finds it wise to follow the rationale of other courts which have denied a stay in cases involving the violation of civil rights because doing so better serves the public interest. For example, one court refused to delay implementation of injunctive relief pending appeal because it would send a message that "discriminatory employers can continually run over victims of discrimination and make a mockery of civil rights legislation." *Duke v. Uniroyal, Inc.*, 777 F. Supp. 428, 434 (E.D.N.C. 1991) (Footnote omitted). "If civil rights legislation is to have any meaning to those within its protective care, the public must have confidence in the judicial system, and discriminatory employers must learn that their conduct will not be tolerated." *Id.* Based on this reasoning, the Court must conclude that the public interest would not be served by granting a stay.

In sum, in balancing the four *Long* factors, the Court finds that the factors weigh in favor of the plaintiffs and "the public interest lies in immediate implementation of the order." 432 F.2d at 981. Therefore, the Court will deny Circuit City's motion for a stay of its Injunctive Order.

Request For A Stay As To Renee Lowery

Paragraph 5 of the Injunctive Order directs Circuit City to promote Renee Lowery to the position of Supervisor of Management Recruiting, or an equivalent position as soon as such a position becomes open at Headquarters. Until she is promoted, Circuit City must pay Ms. Lowery front pay damages, that is, the difference between her salary and benefits in her current position and the salary and benefits for the Supervisor or equivalent position.[1] Presently, the Supervisor of Management Recruiting position no longer exists and no other equivalent position is open at this time, therefore, Ms. Lowery's injunctive relief is in the form of front pay damages.

Circuit City interprets front pay as a monetary remedy and not an injunctive remedy. Based on this assumption, Circuit City argues that the Court "should treat this award as it would any monetary judgment, and grant the stay as a matter of right." However, the Court disagrees with Circuit City's assessment and finds that front pay is an equitable remedy.

In the context of a case under the Age Discrimination in Employment Act ("ADEA"), the Fourth Circuit has held that front pay is a form of equitable relief. *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1424 (4th Cir.), *cert. denied*, 502 U.S. 963, 112 S. Ct. 429 (1991). Even though this case involves Title VII, the analysis is the same. First of all, 42 U.S.C. §§ 1981a(a)(1) and 1981a (b)(2) explain that compensatory damages exclude back-

[1] Ms. Lowery's current salary is $46,000 per year. As a Supervisor, she would be paid $60,000 per year.

pay and "any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)] [Title VII]." Although section 706(g) does not mention front pay specifically, it does provide that after a finding of intentional unlawful discrimination,

> the court may enjoin the [defendant] from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1). Thus, reading § 1981a and section 706(g) together, the Court concludes that equitable relief cannot constitute compensatory damages. And it follows that because compensatory damages are essentially monetary damages, then equitable relief cannot constitute monetary damages. However, the reverse is not true. As the following discussion reveals, "money damages" can, in some instances, be considered equitable relief.

Now, with that framework in place, the Court turns to what the Fourth Circuit has said regarding monetary damages and front pay. "Money damages . . . are not always legal in nature; a money damages award may be a form of equitable relief if it is 'restitutionary' or incidental to or intertwined with injunctive relief." *Duke*, 928 F.2d at 1424 (quoting *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 110 S. Ct. 1339 (1990)). In discussing the nature of front pay, the Fourth Circuit continued:

> [W]hether front pay is to be made available to a plaintiff under the ADEA is a matter left to the discretion of the trial judge who must consider a host of factors, including whether reinstatement is practical. While reinstatement, which is clearly an equitable remedy, is the much preferred remedy, front

> pay may serve as a substitute or a complement. . . . It can be awarded to complement a deferred order of reinstatement or to bridge a time when the court concludes the plaintiff is reasonably likely to obtain other employment. . . . The infinite variety of factual circumstances that can be anticipated do not render any remedy of front pay susceptible to legal standards for awarding damages. Its award, as an adjunct or an alternative to reinstatement, must rest in the discretion of the court in shaping the appropriate remedy. Thus, as with back pay under Title VII, front pay under the ADEA has a restitutionary nature.

928 F.2d at 1424.

There can be no argument that this Court's order that Circuit City promote Ms. Lowery is equitable in nature just like the remedy of reinstatement. Further, the Court complemented that award of a promotion with the award of front pay, pending the promotion. The front pay award in this case is an alternative to the promotion and is thus "restitutionary" and "incidental to or intertwined with injunctive relief." Thus, the only rational conclusion under these circumstances, and in light of the Fourth Circuit's interpretation of these issues, is that Ms. Lowery's front pay award is equitable and not monetary in nature. Therefore, Circuit City is not entitled to a stay "as a matter of right."

Getting back to the issue at hand, a stay of Ms. Lowery's award of injunctive relief is inappropriate after a balancing of the *Long* factors. First, Circuit City has failed to show that it will likely prevail on the merits of the appeal because there is no indication that the jury erred in finding that Circuit City discriminated against Ms. Lowery by failing to promote her in 1994. Second, Circuit City will not suffer irreparable injury if the stay is denied. As one court explained in declining to issue a stay of an order to promote the plaintiff,

> Needless disruption and administrative inconvenience, however, are not the equivalent of irreparable injury. Nor are the attendant risks of litigation that may prove necessary to recoup additional wages paid Mrs. Malarkey pursuant to the judgment. . . . A corporation the size of Texaco, which presumably shifts personnel as a matter of course, will not be irreversibly injured by promoting a single, well-qualified employee.

Malarkey v. Texaco, 794 F. Supp. 1248, 1250-51 (S.D.N.Y. 1992).

Third, Ms. Lowery will be substantially harmed by the stay. As the plaintiffs indicate, Ms. Lowery has been wrongfully denied a promotion to a supervisory position for over two and one-half years, and there is no reason to further delay granting her the benefits of a promotion to which she is entitled. Furthermore, the plaintiffs correctly point out that should a position equivalent to the Supervisor of Recruitment Management position come open during the pendency of the appeal, Ms. Lowery should not be prevented by a stay from taking her rightful supervisor position. Fourth, the public interest will not be served by granting a stay because of the need to enforce federal laws prohibiting racial discrimination in employment. Therefore, on balance, the *Long* factors favor Mr. Lowery and the Court will deny Circuit City's motion for a stay of its Injunctive Order as it pertains to Ms. Lowery individually.

SUMMARY

For all of the above reasons the Court will DENY Circuit City's motion for a stay of the Injunctive Order in its entirety and as it relates to Renee Lowery individually. Additionally, the Court will DENY Circuit City's request for a temporary stay pending the appeal of the instant Order denying its motion for a stay. Accordingly, the Court will VACATE its Order dated March 19, 1997 granting a temporary stay of the Injunctive Order.

An appropriate Order shall issue.

/s/ James R. Spencer
United States District Judge

DATE: June 25, 1997

APPENDIX C

[Filed Mar. 12, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action Number 3:95CV964

SHELBY MCKNIGHT, *et al.*,
Plaintiffs,

v.

CIRCUIT CITY STORES, INC.,
Defendant.

MEMORANDUM OPINION

THIS MATTER is before the Court on Circuit City's motion for judgment notwithstanding the verdict, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. For the reasons stated herein, Circuit City's motion is denied and the judgment shall stand.

BACKGROUND

Plaintiffs filed this suit alleging race discrimination in the promotion process at Circuit City's Headquarters in Richmond, Virginia. After a month-long trial, the jury returned a unanimous verdict finding that (1) Circuit City engaged in a pattern or practice of race discrimination; (2) Circuit City wrongfully denied plaintiff Renee Lowery a promotion to the position of Management Recruiting Supervisor in October 1994; and (3) Circuit City wrongfully denied Lisa Peterson promotions to Assistant Super-

visor positions in November 1994 and December 1994. The jury found that Circuit City did not discriminate as to 12 other specific claims of discrimination presented to them.

Circuit City now moves for judgment as a matter of law, claiming that there is insufficient evidence to support the jury's finding of a pattern or practice of race discrimination and discrimination against Lowery and Peterson.

ANALYSIS

I. *Standard of Review*

On a motion for judgment notwithstanding the verdict, pursuant to Rule 50(b), the Court may only overturn the jury's verdict if there is no legally sufficient evidentiary basis for a reasonable jury to have found for the prevailing party. *Anheuser-Busch, Inc. v. L & L Wings, Inc.*, 962 F.2d 316, 318 (4th Cir.), *cert. denied*, 506 U.S. 872, 113 S. Ct. 206 (1992). However, a mere scintilla of evidence is insufficient to sustain a verdict. *Lust v. Clark Equipment Co.*, 792 F.2d 436, 437 (4th Cir. 1986). In making this determination, the Court cannot weigh the evidence or assess the credibility of witnesses. *Anheuser-Busch*, 962 F.2d at 318. Instead, the Court must view the evidence in the light most favorable to the non-moving party and draw legitimate inferences in its favor. *Id.*

II. *Pattern or Practice Claim*

A. *Viability as a Separate Claim*

Circuit City contends that because the Court decertified the class in this suit, the pattern or practice question was improperly submitted to the jury. Asserting that a jury can only decide a claim of pattern or practice in a certified class action or a suit brought by the Equal Employment Opportunity Commission, Circuit City urges the Court to reverse the jury's finding that Circuit City

engages in a pattern or practice of race discrimination. According to Circuit City, the Fourth Circuit's decision in *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267 (4th Cir. 1980), directly supports this argument.

In reality, while discussing the difficulty of making a class action determination in advance of trial, the *Stastny* court emphasized the intertwining of the class action inquiry with the inquiry into the merits of the case. The court explained that the process of determining the propriety of a class action necessarily depends upon answering the substantive question whether there exists a pattern or practice sufficiently and comparably affecting an identifiable class of protected employees. *Id.* at 274. Based on the finding that the plaintiff had not met the class certification requirements of Rule 23, the court held that the trial court should have withdrawn the class action and stricken the class allegations. *Id.* at 276.

According to Circuit City's skewed interpretation of *Stastny*, two fundamental principles exist: "(1) class decertification resolves the merits inquiry of a pattern and practice 'claim' and (2) a pattern and practice 'claim' is the substantive counterpart to a class action and, therefore, cannot exist as a separate 'claim' in a suit involving only individual claims of discrimination." The Court agrees with plaintiffs when they assert that *Stastny* fails to support either of these propositions.

Although seemingly correct, Circuit City's impression of the *Stastny* court's conclusions leaves out an important step in the court's analysis. Crucial to the court's holdings is the finding that the plaintiff did not show the commonality required for class action treatment. *See id.* at 278. Thus, a more accurate reading of the Fourth Circuit's opinion is that when a putative class does not meet the requirements of Rule 23, class certification should be denied, and it is improper to allow the continued prosecution of a separate pattern or practice claim.

Thus, it appears that the Fourth Circuit has not decided the precise question raised by Circuit City. However, this Court's decision to decertify the class in this case and submit to the jury the plaintiffs' pattern or practice claim falls well within the guidelines of the *Stastny* opinion. The Fourth Circuit has held that the use of subjective criteria in employment practices can provide a common link among class members. *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326 (4th Cir. 1983), *cert. denied*, 466 U.S. 951, 104 S. Ct. 2154 (1984). Contrary to Circuit City's bold assertion, this Court never "concluded that there was insufficient commonality under Rule 23 to warrant class certification and a trial on plaintiffs' allegations of class-wide discrimination in promotions." In its class certification order, this Court determined that in conjunction with statistical data, "the managers' and supervisors' subjective decision making procedures comprise a common discriminatory link among the putative class members." Concluding that all other Rule 23 requirements were satisfied, the Court conditionally certified plaintiffs' class.

Following a motion by plaintiffs to sever and bifurcate the jury trial, the Court decertified the class. In the Court's own words, "the efficiency problems, combined with the unfairness issues, [led] the Court to determine that the class action procedure is not the best method of case management." Thus, the only reason the Court decertified the class was because the benefits of class certification, *i.e.*, accelerated and efficient disposition, would not be met by continuing to try the case as a class action. The Court has never found that the class fails to satisfy any of the Rule 23 requirements. Decertification merely for case management purposes does not remove the fact that a group of individuals who qualify for class treatment are entitled to class-wide relief.

Therefore, although the case was not tried as a "typical" bifurcated class action discrimination suit, plaintiffs were still entitled to prosecute the class-wide pattern or practice

claim of disparate treatment on behalf of other similarly situated individuals who would later be entitled to bring their own individual claims into the justice system. Hence, the pattern or practice question was properly presented to the jury.

B. *Sufficiency of the Evidence to Support a Pattern or Practice Finding.*

Next, Circuit City argues that even if the pattern or practice question was properly submitted to the jury, the evidence in the record is legally insufficient to support the jury's verdict. A pattern or practice claim of race discrimination requires a plaintiff "to prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 336 (1977). By a preponderance of the evidence, the plaintiff must establish "that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Id.*

1. Statistical Evidence

First, Circuit City attacks the sufficiency of the statistical evidence presented at trial. Circuit City argues that all of the trial evidence established that the promotion practices at Circuit City are decentralized. Thus, Circuit City continues, plaintiffs' expert, Dr. Harless, failed to show any legally significant discrimination because he aggregated all of the promotions to be examined.

To support its contention, Circuit City quotes from the *Stastny* court's class certification discussion: ". . . statistical proof designed to show disparity must be fairly adapted to the actual labor pools, work categories and like groupings of persons within which a discriminatory employment practice is alleged to have occurred." 628 F.2d at 274. In *Stastny,* the Fourth Circuit reversed a class certification, saying that the "locus of autonomy" in

making the challenged employment decisions was a "critical factor" in determining whether the commonality requirement was met. *Id.* at 279. It should be noted that the discussion involved multiple facilities and whether there should be state-wide class certification rather than class certification for a single facility. The evidence pointed to a substantial degree of local autonomy and separate labor pools for each facility. *Id.* Thus, the court rejected the state-wide statistical data because it was not broken down by facility and any discrimination inferable from the statistics could have come from a portion of the facilities and not all of them. *Id.* at 279-80.

As shown by the evidence, plaintiffs' case is different from the one presented in *Stastny*. Plaintiffs challenge the promotion practices of Circuit City Headquarters—a single unit—and not multiple facilities of Circuit City. Further, Headquarters operates as a single unit: management trainees rotate through different departments; inter-departmental transfers occur; and, the same Human Resources department services all departments and managers. As this Court pointed out in its Memorandum Opinion dated December 3, 1996, Kate Powis testified that all employees, both African American and Caucasian, are hired into a common labor pool, and they are all equally qualified.[1] Thus, an aggregated group of candidates from

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[1] Circuit City states that Kate Powis never said this. However, it admits that Marie Colvin agreed that African American and Caucasian employees at FNANB are equally competent, otherwise, they would never have been hired. Circuit City urges that this statement is limited to FNANB.

Plaintiffs point out that Kate Powis acknowledged that Circuit City's policy is to develop its employees for upward mobility and to promote from within. There is nothing in the record to indicate that these policies are limited to FNANB which, after all, is under the Circuit City Headquarters umbrella.

As plaintiffs argue, Circuit City did not and could not contend that the African Americans it hired into entry level positions at Headquarters were less qualified as a group than white entry level hires. Accordingly, the company's policy of training and promoting

Headquarters is a suitable labor pool from which to conduct statistical analysis of Circuit City's promotion rate of African Americans into supervisory positions.

After faulting Dr. Harless' method of conducting his statistical studies, Circuit City proclaims that Dr. Harless' results are legally insufficient. Central to this argument are the results of Circuit City's own expert, Dr. Haworth, who testified that no pattern or practice of discrimination in promotions existed at Circuit City. The argument is based on the fact that her statistical evidence was modeled after the actual promotion process at Circuit City, whereas, Dr. Harless' study was not. Dr. Haworth performed her analysis department by department, and then aggregated her results for the six "divisions" at Headquarters. Touting the fact that 17 African American employees who testified at trial received at least 34 promotions among them over the relevant time period, Circuit City advances that the three instances of discrimination found by the jury are "isolated." Therefore, Circuit City concludes, the jury could not have reasonably concluded from this evidence that a pattern or practice of discrimination in promotions exists at Circuit City.

In response, plaintiffs highlight that the regression analyses that Dr. Harless conducted produced standard deviations of close to 7.2, even when he changed the independent variables each time. Additionally, plaintiffs note that statistical evidence proffered by Circuit City could have also been the basis of the jury's finding of a pattern or practice of discrimination. Specifically, in his rebuttal report, Dr. Harless aggregated Dr. Haworth's results for the six Headquarters divisions and found that the promotion rates differed by 4.5 standard deviations. Although courts "should be extremely cautious in drawing any con-

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from within should have resulted in comparable promotion rates between the two groups. Thus, based on this evidence, it is reasonable for a jury to have concluded that there is a pattern and practice of race discrimination at Circuit City Headquarters.

clusions [of legal significance] from standard deviations in the range of one to three," a statistical analysis "with standard deviations of more than three" could safely be used . . . absolutely to confirm" an inference of some "disparity." *E.E.O.C. v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 648 (4th Cir. 1983), *rev'd on other grounds*, 467 U.S. 867, 104 S. Ct. 2794 (1984) (quoting *E.E.O.C. v. American Nat'l Bank*, 652 F.2d 1176, 1192 (4th Cir. 1981), *cert. denied*, 459 U.S. 923, 103 S. Ct. 235 (1982)). Hence, Dr. Harless' rebuttal evidence in addition to his direct evidence is legally significant.

Through their experts, both plaintiffs and Circuit City presented legally significant evidence to the jury. Jurors are not obliged to disregard the evidence propounded by plaintiffs simply because Circuit City believes that its statistical methods are better, or because it attempted to discredit plaintiffs' statistical evidence. As fact finders, the jurors are entitled to give the evidence the weight they think it deserves. Seemingly, the jurors gave more weight to the plaintiffs' direct and rebuttal evidence than they gave to Circuit City's statistical evidence, and they cannot be faulted for reaching this conclusion.

In sum, the Court finds that Dr. Harless' studies and reports provided a legally sufficient basis for the jury to find a pattern or practice of discrimination at Circuit City's Headquarters. Further, the jury reasonably accepted plaintiffs' statistical evidence over the statistical evidence offered by Circuit City.

2. Other Evidence

Moving on, Circuit City contends that even assuming that plaintiffs' statistical evidence is legally sufficient, statistics alone, when disputed, are insufficient to show that discrimination is the Circuit City's standard operating procedure. In fact, a prima facie showing of discrimination

may be made out by statistics alone, or "by a cumulation of evidence, including statistics, patterns, practices, general policies or specific instances of discrimination." *Federal Reserve Bank of Richmond*, 698 F.2d at 645 (citations omitted). Therefore, the error in Circuit City's argument lies in the fact that plaintiffs presented much more than statistical evidence to prove their case.

Circuit City maintains that all of the testimony from the anecdotal witnesses presented at trial was legally insufficient because they could not meet the *McDonnell Douglas* test by showing that they were qualified for the promotion at issue and passed over in favor of a less qualified similarly situated Caucasian. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817 (1973).[2] Further, the testimony of these witnesses, according to Circuit City, failed to provide sufficient evidence to rebut as pretext the evidence offered by Circuit City of legitimate, nondiscriminatory reasons for the challenged decisions.

On these points, the Court disagrees with Circuit City. Each of the anecdotal witnesses proved a prima facie case of discrimination and the entire record is replete with evidence of pretext. As evidence of pretext, witnesses throughout the trial produced evidence of the subjective decisionmaking process, failure to post job openings in a uniform manner, hand-picking the employees for promotions, racially derogatory remarks, and numerous other instances of discrimination. Based on all of this evidence, the Court finds that the evidence presented by the anecdotal witnesses satisfies the *McDonnell Douglas* test.

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[2] An individual proves a prima facie case by showing that he or she (1) belongs to a racial minority, (2) applied and was qualified for a vacant position the employer was attempting to fill, (3) was rejected for the position, and (4) after his rejection, the position remained open and the employer continued to seek applicants of the plaintiff's qualifications. 411 U.S. 802, 93 S. Ct. 1824.

The Court will not begin to recount the seemingly endless footnotes regarding the anecdotal witnesses who allegedly failed to meet their burden to prove their own discrimination. Plaintiffs deftly respond to each of Circuit City's recitations regarding the failure on the part of these witnesses. Underlying each of Circuit City's contentions is a jury question. Many of the "legitimate business reasons" articulated by Circuit City were that the witness was not discriminated against or that he or she was not qualified for the supervisory position. The jury was not bound to accept this testimony. In many cases, these reasons were relayed by a person in management with no objective, documentary evidence to support the assertion. Additionally, the circumstances surrounding each denial of a promotion related, among other factors, to the excessive subjectivity in the promotion process, the lack of a uniform system for posting job openings, allegations of racial remarks by those in management, or the time at [sic] the witness began to receive negative performance reviews.

In addition to the evidence of pretext and witness testimony outlined above, plaintiffs presented other evidence which indicated a pattern or practice of discrimination or pretext as to Circuit City's explanations for its actions. For instance, there was evidence that Circuit City does not monitor promotions to guarantee that discrimination does not play a role in the decision-making process. Additionally, many witnesses testified that they did not use any of Circuit City's avenues designed to encourage employees to bring forth discrimination problems because of fear of retaliation. Further, there was evidence that Circuit City failed to respond to complaints of discrimination concerning promotions. Also in the evidence was the Booth Report, which Circuit City made no attempt to respond to. Finally, the jury was aware that plaintiffs only discovered the existence of the Cook Report shortly before trial and only through one of their own anecdotal witnesses. Certainly the jury cannot be faulted and was reasonable in

accepting any or all of these factors as pretext for Circuit City's presumably legitimate non-discriminatory reasons for its employment decisions.

Circuit City attempts to invade the province of the jury to balance the weight of the facts and to assess the credibility of witnesses. However, the Court cannot do so in a motion for judgment notwithstanding the verdict. The jury was entitled to accept all of the evidence presented by plaintiffs and to reject as pretext Circuit City's proffered nondiscriminatory reasons for its employment decisions. Hence, the Court finds that the jury was reasonable in finding a pattern or practice of discrimination based on the statistical evidence, the anecdotal evidence, and other evidence presented at trial and will allow the judgment to stand on that basis.

III. *Individual Claims*

Plaintiffs' claims of individual discriminatory treatment must be analyzed under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), and its progeny. Under this analytical framework, plaintiffs must first establish a prima facie case of discrimination. An individual proves a prima facie case by showing that he or she (1) belongs to a racial minority, (2) applied and was qualified for a vacant position the employer was attempting to fill, (3) was rejected for the position, and (4) after his rejection, the position remained open and the employer continued to seek applicants of the plaintiff's qualifications. *Id.* at 802, 93 S. Ct. at 1824.

If a plaintiff succeeds in establishing a prima facie case, Circuit City may rebut the presumption of discriminatory intent by articulating legitimate nondiscriminatory business reasons for the challenged actions. The ultimate burden of persuasion remains with plaintiffs throughout the *McDonnell Douglas* process. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993). If plain-

tiffs can prove that the reasons offered by Circuit City are not the true reasons, but instead, actually are pretext for discrimination, plaintiffs may prevail on their claims of disparate treatment. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981). To prove pretext, plaintiffs must demonstrate "both the reason [articulated by the employer] was false, and that discrimination was the real reason [for the challenged action]." *Hicks*, 113 S. Ct. at 2752.

The Supreme Court, in *Teamsters*, explained that the *McDonnell Douglas* test is not the only way in which a plaintiff can establish a prima facie case of individual discrimination. 431 U.S. at 358, 97 S. Ct. at 1866. "The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." *Id.* (footnote omitted). The plaintiff's initial burden of proof can also be met by demonstrating the existence of a discriminatory hiring pattern and practice. *See Id.* at 359, 97 S. Ct. at 1867; *See also Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772, 96 S. Ct. 1251, 1268 (1976). After plaintiff establishes the prima facie case, then the employer is required to come forth with a nondiscriminatory justification for the employment action and plaintiff must then submit evidence that the employer's proffered reasons are pretext for unlawful discrimination. *Teamsters*, 431 U.S. at 362 n. 50, 97 S. Ct. at 1868 n.50.

A. *Renee Lowery*

Circuit City contends that the record is devoid of any evidence that could establish that the decision to promote Paige Bell instead of Renee Lowery to Supervisor of Man-

agement Recruitment was caused by race discrimination. Instead, Circuit City argues, the evidence supports the position that Bell was simply the better qualified candidate for the position. According to Circuit City, Lowery failed to meet her burden of producing any evidence of pretext by showing that Renee Lowery had the "skills that Circuit City indisputably valued for the Supervisor of Management Recruiting position."

In pointing out that Lowery presented evidence that she had more educational and prior work experience than Bell, plaintiffs maintain that Lowery succeeded in presenting evidence from which a reasonable jury could find that Circuit City discriminated against Lowery. Plaintiffs also highlight the evidence presented that indicated Lowery's outstanding performance as reflected by her Progress Conference Reports, several years of supervisory experience before becoming a recruiter, and that she had recruited for more departments than any other recruiter. The Court finds that this evidence, in conjunction with the other evidence in the record regarding Circuit City's subjective promotion practices, racial remarks, etc. is sufficient for a reasonable jury to find that Circuit City's decision to promote Bell instead of Lowery was based on discrimination.

The inherent problem with Circuit City's argument is that it bases its non-discriminatory reasons for its promotion decision on a subjective system which the jury found to be discriminatory. For example, Circuit City lists four of Bell's "credentials," which Lowery lacked, and proclaims that these were the qualifications that were valued for the Supervisor position.

Nowhere in Circuit City's promotion policy for this position does it state that a qualified applicant must have, as Bell did, "(1) one year of supervisory experience managing clerical workers at Circuit City; (2) experience as the *de facto* head of the Recruiting department for six weeks; (3) outstanding performance record contain-

ing no negative marks; and (4) unquestioned organizational and leadership skills." These "indisputably valued" skills could only have been created after Bell was hired. Instead of creating specific, objective qualifications for the position before making the hiring decision, Circuit City essentially asserts that the qualifications necessary for the Supervisor position are any qualifications that the successful candidate possesses which Lowery does not possess. From this kind of evidence a reasonable jury could properly find as pretext Circuit City's explanation that Bell was better qualified than Lowery.

B. *Lisa Peterson*

As to Lisa Peterson, Circuit City maintains that she failed to show that she was wrongly denied a promotion to Assistant Supervisor in the Customer Service Mail Department in November and December 1994. With respect to the position that was offered to Janet Whalen in November 1994, Circuit City provides two explanations for the selection of Whalen over Peterson: (1) Whalen was more qualified, and (2) Peterson had already proven that she could not handle the responsibilities of the job after she assumed the role of acting Assistant Supervisor in May 1994. Plaintiffs counter these arguments by offering that although Circuit City claims that Peterson performed insufficiently as acting Assistant Supervisor in the Customer Service Mail Department, she was never removed from that position. Additionally, plaintiffs point out that Circuit City did not produce evidence that Whalen had any supervisory experience in that department or any demonstrated familiarity with the kinds of reports and monitoring expected of an Assistant Supervisor for the Customer Service Mail Department.

Harping on the fact that Peterson received a verbal coaching in August 1994, Circuit City contends that the jury had no basis in the record to conclude that its action was discriminatory. However, the point is that the jury

is entitled to weigh the facts and the credibility of witnesses. And in doing so, it is within the jury's province to conclude that Circuit City's assertion that Whalen was more experienced is untrue, and that the real reason Peterson was denied the promotion is based on discrimination. Presented with all of the evidence in the record regarding Circuit City's subjective promotion practices, a reasonable jury could have properly found pretextual Circuit City's assertion that Whalen was better qualified than Peterson.

Finally Circuit City attacks the jury's finding as to the Customer Service Assistant Supervisor position filled by Denise Ramos in December 1994. Ramos was laterally transferred from her Assistant Supervisor position in the Human Resources Department essentially because she was struggling with some of the requirements of the position and was having trouble keeping up with her duties. Circuit City argues that because the December 1994 position involved a lateral transfer and not a promotion, the jury could not properly find discrimination in the decision.

Although Circuit City makes an interesting argument, it totally misses the point. The *McDonnell Douglas* prima facie test requires the plaintiff to show that she was qualified for a vacant position the employer was attempting to fill. From any perspective, the Customer Service Assistant Supervisor position filled by Ramos was vacant and Circuit City sought to, and did indeed, fill it. Therefore, contrary to Circuit City's contentions, Peterson had a legal basis to claim discrimination as to this claim.

Furthermore, Circuit City's assertion that no jury could conclude that Peterson was more qualified for the position that Ramos fails to hold water. As plaintiffs stress, Peterson was already serving as an acting Assistant Supervisor in the Customer Service Department. On the other hand, Ramos had no prior Customer Service experience, no knowledge of the operating functions of the bank, no background in contacting customers, and no knowledge

of the computer system used. To top that off, Ramos was failing in her job as Assistant Supervisor—enough so that management transferred her out of her position. On these facts alone, a reasonable jury could have validly found that Circuit City's reasons for failing to promote Peterson to the Assistant Supervisor position were a mere pretext for discrimination.

CONCLUSION

In sum, viewing the evidence in the light most favorable to plaintiffs, the Court finds that there is sufficient evidence in the record to support the jury's verdict. For all of the reasons stated above, the judgments in favor of plaintiffs shall stand. Accordingly, the Court will DENY Circuit City's motion for judgment as a matter of law after the verdict.

An appropriate order shall issue.

/s/ James R. Spencer
United States District Judge

DATE: Mar. 12, 1997.

[Filed Mar. 17, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISON

Civil Action Number 3:95CV964

SHELBY MCKNIGHT, *et al.*,
Plaintiffs,

v.

CIRCUIT CITY STORES, INC.,
Defendant.

ORDER

THIS MATTER is before the Court on Circuit City's motion for judgment notwithstanding the verdict, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. For the reasons stated in the accompanying Memorandum Opinion, Circuit City's motion is hereby DENIED. Accordingly, the judgments in favor of plaintiffs shall stand.

Let the Clerk send a copy of this Order to all counsel of record.

It is SO ORDERED.

/s/ James R. Spencer
United States District Judge

DATE: Mar. 12, 1997.

APPENDIX D

[Filed Mar. 12, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISON

Civil Action Number 3:95CV964

SHELBY MCKNIGHT, *et al.*,
Plaintiffs,

v.

CIRCUIT CITY STORES, INC.,
Defendant.

ORDER AND DECREE

THIS MATTER is before the Court of plaintiffs' motion requesting the Court to enter a permanent injunction against defendant Circuit City Stores, Inc. as a result of the jury's finding on December 2, 1996, that Circuit City intentionally engaged in a pattern or practice of racial discrimination as related to promotions against its former and present African American employees between April 1992 and December 1996 at its corporate headquarters in Richmond, Virginia ("headquarters"). Upon due consideration of the record in this case, the jury's verdict, plaintiff's motion and Circuit City's opposition thereto and for good cause shown, plaintiffs' motion is hereby GRANTED.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

A. GENERAL PROVISIONS

1. Defendant Circuit City Stores, Inc., its officers, employees, agents and successors ("Circuit City") are permanently enjoined from engaging in any act or practice which has the purpose or effect of discriminating against any African American employee at Headquarters with regard to promotions because of his or her race.

2. Circuit City shall promote persons at Headquarters without regard to their race on the basis of objective, job related and racially-neutral standards using the procedures specified below. Nothing in this Order shall be construed as requiring the promotion of any African American at Headquarters to a job he or she is not qualified to perform, as determined in accordance with the standards and procedures set forth in this Order.

3. Circuit City is permanently enjoined from taking any adverse employment action against any African American employee or prior employee, including the named plaintiffs in this case and the African American witnesses who testified on plaintiffs' behalf at the trial, or from intimidating, harassing or retaliating against such persons in any way.

4. Within five (5) working days of this Order, Circuit City shall cause a copy of this Order to be given to every Circuit City officer, employee and board member at Headquarters and shall file with the Court and serve on counsel for plaintiffs a notice that such dissemination has been accomplished.

B. PROVISIONS FOR PLAINTIFF RENEE LOWERY

5. Circuit City shall immediately promote plaintiff Renee Lowery ("Lowery") to Supervisor, Management Recruiting or equivalent position. If such a position is not presently open at Headquarters, Circuit City shall

promote Lowery to such a position as soon as it becomes open and shall pay Lowery, in addition to her present salary and benefits, the difference between that salary and benefits and the present salary and benefits of a Supervisor, Management Recruiting, between December 2, 1996 and the date of her promotion to that position.

C. PROVISION FOR A DEPARTMENT OF DIVERSITY MANAGEMENT

6. Circuit City shall immediately establish the position of Director of Diversity Management ("the Director") within the Human Resources Area and shall provide such support and other resources to ensure that the incumbent of this newly developed position functions effectively to carry out the purposes of this Order. The Director shall be hired by Circuit City from outside the company within ninety (90) days of this Order. Circuit City's proposed Director or his or her hiring is subject to comment by plaintiffs and Court approval.

7. The Director shall be principally responsible for ensuring that Circuit City complies with the terms of this Order. The Director and the Vice President in charge of Human Resources shall be responsible for selecting any additional employees that may be necessary to aid the Director in carrying out the mandates of this Order.

8. Within thirty (30) days of his or her hiring, the Director shall select an outside consultant ("the Consultant") to give diversity management training to all officers, board members and supervisory employees at Headquarters. The selection of the Consultant will be subject to the approval of the Court.

9. Within ninety (90) days of selecting a diversity management consultant, the Consultant shall present a program, to be given to all supervisory employees, officers and board members at Headquarters, concerning diversity management and the methods and procedures to be used to prevent and eliminate discrimination with respect to

promotions. This program is to be submitted to plaintiffs, their counsel and human resources expert for comment prior to presentation. The program shall include, but is not limited to, information concerning "similar-to-me-error" and the "best practices" of other corporations concerning diversity management. This program shall be videotaped and shown to each newly-hired (or elevated) supervisory employee, officer and board member at Headquarters upon his or her arrival. A refresher course on diversity management shall be given by an outside consultant every two (2) years to all supervisory employees, officers and board members at Headquarters during the pendency of this Order.

D. PROVISIONS FOR A REVISED PROGRAM CONCERNING PROMOTIONS

10. Within ninety (90) days of his or her hiring, the Director shall file with the Court and serve on counsel for plaintiffs a proposed revised program for promotions at Headquarters ("the Program"). The Program shall include at least all of the matters set forth below. Within fifteen (15) days of the filing of the Program, counsel for plaintiffs may file an objection or other response thereto. The Court will thereafter approve, modify or reject the Program.

11. The Program shall include at least the following matters:

(a) *Common Procedures for Promotions.* The Director, in consultation with, and with the approval of, the Consultant, shall develop a common body of procedures and guidelines governing promotion selections at Circuit City Headquarters. All promotions at Circuit City Headquarters shall be performed in accordance with these procedures and the persons selected for such promotions shall be from among candidates who have complied with the application procedures.

(b) *Job Analysis and Job-Related Criteria for Selection.* The Consultant shall conduct a job analysis of each vacant position that will identify the duties performed, the qualifications required for successful performance in the position and the job-related criteria for selection for each position. Promotion decisions shall rely upon criteria for selection that are job-related and that are drawn from the job analysis conducted periodically to ensure that the criteria used in making selections are related to successful performance in each position.

(c) *Position Descriptions.* The Director shall prepare, or oversee, the preparation of, detailed descriptions of each position at Headquarters. These descriptions shall be based upon information obtained through the job analyses of each position, as described in paragraph (b) above.

(d) *Posting of Vacancies.* All promotion vacancies shall be posted in writing and disseminated to all employees at Headquarters. These postings shall follow a common format which shall include at least the identity of the position, a description of the job, the duties of the job, the requirements for applicants and how and where applicants may apply.

(e) *Promotion Records.* All officers, managers, supervisors and other employees engaged in promoting employees at Headquarters ("the Promoters') shall make and keep written records of every promotion awarded at Headquarters ("the Promotion Records"). The Promotion Records shall include at least the name, race, and date of application for each applicant for promotion, the title and location of the position for which they applied, the stages of the promotion process through which each applicant pro-

ceeded and the name and race of the person selected for each vacancy. The Promoters shall enumerate in writing the reasons for the selection of the successful applicant and for the rejection of the unsuccessful applicants, which reasons shall be part of the Promotion Records.

(f) *Review of Promotion Recommendations.* For a period of two (2) years from the entry of this Order, no promotion decision shall be final until the Director has determined that the selection has been made on the basis of job-related and racially neutral criteria. Thereafter, Circuit City shall develop a procedure pursuant to which final promotion decisions are reviewed regularly by the Director to ensure that they are based upon job-related and racially neutral criteria.

(g) *Career Development and Mentoring.* The Director and his or her staff shall establish a career development and mentoring program for all African American employees at Headquarters. The career development program, which will include mentoring, will identify common competencies for managerial and supervisory success at Headquarters, and the behaviors which are demonstrative of meeting expectations, outstanding performance and unacceptable performance. The career development and mentoring program will be under the direction and supervision of the Director.

(h) *Monitoring and Measurement.* In addition to the review of each recommended promotion decision as stated above, the Director and his or her staff shall establish procedures to monitor the performance of all the Promoters at Headquarters and to detect whether there is a significan difference in the rate of promotions between Caucasian and similarly-situated African Amer-

ican employees every six months. Such differences in promotion rates if any, may be assessed using standard statistical measures or, where the number of promotions during the period is too small to permit a meaningful statistical analysis, any differences in promotion rates should be assessed using the rule set forth in the Uniform Guidelines on Employee Selection, 29 C.F.R. § 1607.4D.

(i) *Merit Reviews.* The Director and his or her staff shall revise Circuit City's procedures for the merit reviews of its employees at Headquarters to ensure (1) that they reflect the behavior that is required for the successful performance of each job; (2) that they are anchored in observable behavior; and (3) that the Promoters are evaluated on, among other things, their success in managing a diverse work force in a racially-neutral manner.

(j) *Racial Complaints.* The Director and his or her staff shall revise Circuit City's procedures regarding complaints of racial discrimination. Those procedures shall provide that the complaining employee lodge his or her complaint directly with the Director, who shall respond personally within two (2) working days of receiving the complaint, and shall take appropriate action as soon as possible to investigate and resolve the complaint. All such complaints and responses, whether verbal or otherwise, shall be reduced to writing and included in the reports to be filed by the Director with this Court.

(k) *Training.* A new revised training component for all Promoters shall be prepared, which shall cover at least the following matters: diversity management; "similar-to-me-error"; the proper way to conduct an interview of a promotion

applicant; ways of detecting and avoiding the use of racial stereotypes in making promotion decisions; behavior that constitutes discrimination on the basis of race and retaliation; best practices of other companies in race-neutral promotion practices; the training of mentors in the career development process; and the training of African Americans to be mentored.

E. PROVISIONS FOR REPORTING AND ENFORCEMENT

12. The Court shall retain jurisdiction of this case for at least five (5) years, and thereafter for as long as shall be required to carry out the purposes of this Order.

13. In addition to the aforesaid reporting requirements, the Director shall file reports from the date of this Order with the Court and serve a copy on counsel for plaintiffs. These reports will be filed on a semi-annual basis for the first two (2) years following this Order. Thereafter, the reports will be filed on an annual basis. These reports shall include the following:

(a) The computerized employment data reported by Circuit City on its employees at Headquarters, including the same information and in the same format as produced by Circuit City before trial;

(b) A summary, by department, of all promotions granted in the preceding reporting period broken down by race;

(c) All Promotion Records;

(d) The promotion analyses conducted pursuant to the requirements of Paragraph 11 (h) above; and

(e) All complaints and responses indicating racial concerns as described above.

14. In the event plaintiffs believe that Circuit City has breached a term of this Order, they shall send a letter to the Director, with a copy to the Court, detailing the nature of the breach and the requested remedial action to be taken by Circuit City. If no satisfactory action is taken within twenty-one (21) days of Circuit City's receipt of plaintiffs' notice, plaintiffs may file a motion with the Court for the enforcement of this Order and for appropriate sanctions. Should the Director need to be replaced during the pendency of this Order due to illness, retirement, death or other reasons, Circuit City shall immediately hire a successor to the Director, whose selection shall be subject to the approval of the Court.

15. Plaintiffs' counsel may apply to the Court semi-annually for fees and expenses *reasonably* incurred in the monitoring and enforcement of this Order.

Let the Clerk send a copy of this Order and Decree to all counsel of record.

It is SO ORDERED.

/s/ James R. Spencer
United States District Judge

DATE: Mar. 12, 1997

APPENDIX E

[Filed Mar. 12, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISON

Civil Action Number 3:95CV964

SHELBY MCKNIGHT, *et al.*,

v. *Plaintiffs,*

CIRCUIT CITY STORES, INC.,
Defendant.

MEMORANDUM OPINION

THIS MATTER is before the Court on defendant Circuit City's motion (1) to set aside the punitive damages awarded to plaintiffs Renee Lowery and Lisa Peterson, or in the alternative, for a remittitur of those awards, and (2) to set aside the back pay damages awarded to Lowery and the compensatory damages awarded to Peterson. For the reasons stated herein, the Court will DENY Circuit City's motion.

BACKGROUND

After a month-long trial in this race discrimination case, the jury returned a unanimous verdict. Among other things, the jury made the following findings: (1) Circuit City engaged in a pattern or practice of racial discrimination with regard to promotions of African Americans at its Headquarters in Richmond, Virginia between April 1992 and December 1996; (2) Circuit City wrongfully denied Lowery a promotion to the Management Recruiting Supervisor position in October 1994; and (3) Circuit

City wrongfully denied Peterson promotions to Assistant Supervisor positions in November 1994 and December 1994.

The jury awarded Lowery $7,000 in compensatory damages, $5,000 in back pay and $225,000 in punitive damages. Peterson was awarded $2,700 in compensatory damages, $1,500 in back pay and $47,000 in punitive damages.

ANALYSIS

Renee Lowery's Back Pay Damages

With regard to Circuit City's discriminatory employment action in October 1994 when it promoted Paige Bell to Management Recruiting Supervisor instead of Lowery, the jury awarded Lowery $5,000. Circuit City contends that there is no evidence in the record to support this award of back pay.

The purpose of a back pay award is to make the discrimination victim whole. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S. Ct. 2362, 2372 (1975). In this Circuit, "the appropriate means of determining the effects of discriminatory actions is to construct a 'hypothetical employee' and to follow him as he advances through the company's ranks." *E.E.O.C. v. Korn Indus., Inc.*, 662 F.2d 256, 263 (4th Cir. 1981). The employment history of the applicant who was actually hired instead of the victim usually provides the best guide in determining the hypothetical employment history for the victim. *E.E.O.C. v. Ford Motor Co.*, 645 F.2d 183, 199 (4th Cir. 1981), *rev'd on other grounds*, 458 U.S. 219, 102 S. Ct. 3057 (1982). Once the hypothetical career path is determined, the court compares the victim's employment history to that of the hypothetical employee and awards the victim any salary difference that existed during the relevant period. *White v. Carolina Paperboard Corp.*, 564 F.2d 1073, 1084 (4th Cir. 1977); *Korn Indus.*, 662 F.2d at 263.

The Court instructed the jury in this case in accordance with these guidelines set out by the Fourth Circuit:

> In determining the salary any particular plaintiff would have received had she not been improperly denied the promotion, if you so find, you may look at the career path of the employee with the plaintiffs' skills and experience, but who was not discriminated against, and apply that employee's actual salary and fringe benefits as a guide in making your award. This award should include any raises that the comparable employee received through the promotion in question and for any subsequent promotions. In other words, you should place the plaintiff in the position she would have been had the plaintiff not been the victim of discrimination.

Thus, the appropriate career path to follow in this case is Paige Bell's because she was promoted to the Management Recruiting Supervisor position instead of Lowery in October 1994. At that time, Lowerys salary as a Management Recruiter was $40,600. After Bell was promoted to Supervisor, her salary was $42,000—this was $1,400 more than Lowery's salary. In March 1995, Bell's salary increased to $47,000, while Lowery's salary increased to $42,200. The spread between the salaries at this point was $4,800. Hence, from October 1994 until the end of 1995, Lowery lost approximately $6,200 in salary due to Circuit City's discrimination against her. Accordingly, the Court finds that the evidence in the record more than adequately supports the $5,000 award of back pay damages.[1]

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[1] Circuit City takes issue with the source of this salary data. Bell's salary figures are found in defense exhibits 992 and 988. Circuit City argues that because these documents were never cited at trial and were never the subject of any testimony, they were improperly before the jury.

However, before trial, the Court ruled on the parties' objections to the exhibits, and all exhibits which were not excluded by the

Lisa Peterson's Compensatory Damages

Next, citing a Fifth Circuit case, Circuit City argues that the evidence in the record is insufficient to support the jury's award of $2,700 in compensatory damages to Peterson because Peterson did not offer any corroborating testimony or medical or psychological evidence to support her damages testimony. *See Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3501 (1997) ("In order to establish intangible loss, we recognize that [*Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042 (1978)] requires a degree of specificity which may include corroborating testimony or medical or psychological evidence in support of the damage award."). Although Fifth Circuit law may be instructive on this issue, Fourth Circuit case law is controlling.

Specifically addressing this issue, the Fourth Circuit has held that

> a plaintiff's testimony, standing alone, *can* support an award of compensatory damages for emotional distress based on a constitutional violation; however, the testimony must establish that the plaintiff suffered demonstrable emotional distress, which must be sufficiently articulated; neither conclusory statements that the plaintiff suffered emotional distress nor the mere fact that a constitutional violation occurred supports an award of compensatory damages. In marshaling the evidence necessary to establish emotional distress resulting from a constitutional violation, *Carey* instructs us that "genuine injury" is necessary.

Price v. City of Charlotte, 93 F.3d 1241, 1254 (4th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3467 (U.S. Dec. 16, 1996) (No. 96-962) (emphasis added). Al-

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Court were admitted into the record. Therefore, Circuit City's argument fails because all of the documents sent to the jury room at the conclusion of trial had been properly admitted into evidence.

though the *Price* court concluded that the testimony in that case was insufficient to support an award of compensatory damages, the court specifically stated, "we do not hold that a plaintiff's testimony standing alone is insufficient as a matter of law to support an award of compensatory damages." *Id.* at 1257. Hence, because Peterson's testimony alone can support an award of compensatory damages as a matter of law, the only question left for the Court is whether Peterson's testimony, standing alone, is sufficient to support her $2,700 compensatory damages award.

In *Price*, seven white police officers sued the City of Charlotte under 42 U.S.C. § 1983, contending that promotions practices for advancement in the police department violated the Constitution. *Id.* at 1243. Among other relief, a jury awarded each officer $3,000 in compensatory damages for his injury in being subjected to the unconstitutional promotions practice.[2]

The court highlighted some of the testimony that was insufficient to support a compensatory damages award: several officers felt betrayed, embarrassed, degraded, and passed over; other officers felt devastated, deceived, and disappointed; one officer stated that his "self-esteem went from rather high" and his confidence dropped[3]; and an-

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[2] However, none of the plaintiff-appellees asserted a denial of promotion, and the City did not appeal awards of compensatory damages to plaintiffs who were denied promotions because of their race. Thus, the appellees in this case are police officers who would not have been promoted regardless of a racially discriminatory promotions practice. *Price*, 93 F.3d at 1244 n.1.

Already, it is easy to distinguish this case from Peterson's circumstances. First, Peterson asserted and was successful on two denial of promotion claims. Second, the jury explicitly found that she was denied the promotions because of her race. Finally, she would have been promoted had it not been for the racially discriminatory promotions practice at Circuit City.

[3] The court noted that he did not testify that any consequence resulted from his drop in self-esteem.

other officer testified that he lost all respect for the chief of police. *Id.* at 1255. The court concluded that because of the lack of explanation or description regarding the officers' emotional distress, the "evidence fails to show 'genuine injury' evidenced by 'nature and circumstances of the wrong and its effect' under *Carey*." *Id.* Further, the court noted, "their injuries, if any, are properly characterized as disappointment with their superiors, rather than emotional distress." *Id.* at 1256. Accordingly, the court reversed the award of compensatory damages to the officers.

Unlike the officers in *Price*, Peterson offers evidence of the emotional distress she suffered. In her testimony, Peterson stated the following:

> It made me question myself. I questioned my abilities to perform. It just kind of made me second guess myself, is there something I'm not doing? So it kind of knocked down my confidence, I would say.

Her statements, although brief, are not conclusory statements that she was "emotionally distressed" or "disappointed" or any similar statement. Rather, her testimony explains the effect of the emotional distress on her. She questioned her ability to perform and second-guessed herself. These statements are not conclusory, but are a description of how her emotional distress manifested itself. Peterson's reaction has everything to do with her emotional distress and does not, as with the officers in *Price*, express her disappointment with her superiors.

Further, in addition to instructing the jurors that they could award Peterson compensatory damages as a result of "emotional pain and suffering, mental anguish, embarrassment, humiliation, or loss of enjoyment of life," the Court instructed the jurors that they could "also compensate [Peterson] for injury to her and any inconvenience caused by Circuit City's unlawful conduct." There is sufficient evidence in the record that Peterson left Circuit City in search of better job opportunities because of

the racial discrimination that she suffered. Any reasonable jury could infer that leaving a job and conducting a job search creates a burden. Undoubtedly, this evidence also goes toward supporting the jury's award of compensatory damages.

Thus, the award of $2,700 to Peterson as compensatory damages is not against the clear weight of the evidence or based upon false evidence. *Hetzel v. County of Prince William*, 89 F.3d 169, 171 (4th Cir.), *cert. denied*, 117 S. Ct. 584 (1996). Moreover, the verdict is supported by the evidence and will not result in a miscarriage of justice. *Id.* As such, the Court will not set aside the jury's verdict. *Id.*; *See also Bradley v. Carydale Enterprises*, 730 F.Supp. 709, 726-27 (E.D. Va. 1989) (where plaintiff testified that her feelings were hurt after being referred to by a racial epithet; she was humiliated and embarrassed; she had trouble sleeping and was restless; her job performance was interrupted; but she never sought counseling, an award of $9,000 in compensatory damages was appropriate); *McClam v. City of Norfolk Police Dep't*, 877 F. Supp. 277, 284 (E.D. Va. 1995) (plaintiff's testimony about having headaches, feelings of not wanting to come to work and other changes in attitude and devotion to his job, a lowering of his self esteem, as well as difficulty sleeping all support a $15,000 compensatory damages award).[4]

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[4] In remanding *Hetzel* to the district court, the Fourth Circuit directed the court to examine *Bradley* and *McClam*, as the awards were comparable to what would be an appropriate award in *Hetzel*.

The plaintiff in *Hetzel* complained of headaches, stress, trouble reading to her daughter, and problems with her family life. 89 F.3d at 171. However, there was no corroboration of her testimony. *Id.* The court found that her "thin evidence of rather limited damages" entitled her to only "a minimal damage award for intangible injuries." *Id.* Based on these observations, the court concluded that $500,000 is an absolutely outrageous award.

Peterson on the other hand was only awarded $2,700. Even though her damages evidence may be "thin," she is still entitled to "minimal" damages, and in the context of this case, $2,700 is extremely minimal, and appropriate.

Punitive Damages

Circuit City's final attack is on the punitive damages awarded to Lowery and Peterson. Circuit City argues that there is no evidence in the record to support their punitive damages awards. Specifically, it states that the record is devoid of any evidence that Circuit City engaged in "reprehensible, wanton, malicious or bad faith conduct." As discussed below, this is not the standard for punitive damages as applied in the Fourth Circuit.

Plaintiffs are entitled to recover punitive damages under 42 U.S.C. § 1981 and Title VII. *See* 42 U.S.C. § 1981a (a). Section 1981a(b) provides that a complaining party may recover punitive damages if she "demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." The courts have also held that punitive damages may be awarded upon proof of an "evil motive" or "callous indifference to a federally protected right." *Stephens v. South Atlantic Canners, Inc.*, 848 F.2d 484, 489 (4th Cir.), *cert. denied*, 488 U.S. 996, 109 S. Ct. 564 (1988) (citing *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 1640 (1983). Thus, punitive damages may be awarded if the plaintiff shows that the defendant engaged in discriminatory practices with malice, evil intent, or reckless or callous indifference to a federally protected right.

Primarily, punitive damages are imposed to protect the public, as a punishment to the defendant, and as a warning and example to deter the defendant and others from committing similar offenses. *Diaz Vicente v. Obenauer*, 736 F. Supp. 679, 695 (E.D. Va. 1990) (citing *Baker v. Marcus*, 201 Va. 905, 114 S.E.2d 617, 620 (1960)). And unless the award is "so great or small as to evince passion, prejudice, corruption or some mistaken view of law, the jury's verdict should not be set aside." *Garrick v. Kelly*, 649 F. Supp. 607, 613 (E.D. Va. 1986), *aff'd*,

842 F.2d 1290 (1988) (citing *Giant of Virginia, Inc. v. Pigg*, 207 Va. 679, 152 S.E.2d 1271 (1967)).

In this case, punitive damages were properly awarded by the jury. In addition to the evidence in the record regarding the excessive subjectivity of Circuit City's promotion practices, plaintiffs presented evidence that Circuit City ignored numerous complaints of racial discrimination at its corporate Headquarters. Additionally, there is evidence in the record that Circuit City took no action to remedy the complaints of racial discrimination in its promotion practices as identified by Coffee Conferences and the Booth and Cook reports. Further, the jury was aware that after reviewing its contents, Circuit City attempted to recall all of the copies of the Booth report that had been distributed. Moreover, the jury found that Circuit City discriminated against Lowery and Peterson in the very promotion process that Circuit City refused to accept as discriminatory. The jury was entitled to accept this evidence as true, and could have reasonably considered all of this as evidence of Circuit City's callous or reckless indifference to plaintiffs' federal right to be free from race discrimination.

Finally, Circuit City argues that even if the evidence at trial supports an award of punitive damages, the amounts awarded are grossly disproportionate to the back pay and compensatory damages awarded to Lowery and Peterson. Calculating the relationship between Lowery's punitive damages of $225,000 and her compensatory damages of $7,500, Circuit City notes that the ratio is 30 to 1. The ratio of Peterson's punitive damages and her back pay damages is 31 to 1. To support its argument that these awards are unwarranted, Circuit City cites a recent Supreme Court case in which the Court found grossly excessive a $2 million punitive damages award against a car manufacturer, BMW, where $4,000 in economic damages had been awarded to the owner of a new car that had been repainted by BMW before sale. *BMW of North*

America, Inc. v. Gore, 116 S. Ct. 1589 (1996). Thus, Circuit City concludes, the Court should grant a remittitur of the awards in the case presently before this Court.

At the outset of this discussion, the Court must clarify the actual ratios of damages at issue. As noted in the preceding sections, the evidence in the record supports the back pay award of $5,000 to Lowery, and the $2,700 award of compensatory damages to Peterson. That means that the correct ratio of punitive damages to compensatory damages and back pay for Lowery is 18 to 1. Likewise, the applicable ratio for Peterson is 11 to 1. Now, the Court is prepared to place the *BMW* opinion in the proper perspective.

The Supreme Court in *BMW* enumerated the three guideposts which led it to the conclusion that the jury's award of $2 million in punitive damages was grossly excessive: (1) the degree of reprehensibility of BMW's nondisclosure that the new car had been repainted, (2) the disparity between the harm or potential harm suffered by the car owner and his punitive damage award, and (3) the difference between the punitive damages award and the civil penalties authorized for comparable misconduct. *Id.* at 1598-99. Noting that (1) BMW did not engage in particularly reprehensible conduct; (2) neither the plaintiff nor any other BMW purchaser was threatened with any additional potential harm by BMW's nondisclosure policy; and (3) the $2 million economic sanction is substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance, the Supreme Court held that BMW's conduct was not sufficiently egregious to "justify a punitive sanction that is tantamount to a severe criminal penalty." *Id.* at 1599-1604.

In past cases, the Supreme Court has upheld cases in which the punitive damages award was 4 times, and even 526 times more than the compensatory damages. *See Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 23-24,

111 S. Ct. 1032, 1046 (1991) (although a punitive damage award of 4 times the amount of compensatory damages may be close to the line, it does not cross the line into the area of constitutional impropriety); *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2722-23 (1993) (where actual damages were $19,000 and punitive damages awarded were $10 million, the punitive damages award is not grossly excessive "in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth").

However, the Supreme Court continues to stress that there is no particular formula for determining whether the exemplary damages bear a reasonable relationship to the compensatory damages awarded:

> Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula even one that compares actual *and potential* damages to the punitive award. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if for example, a particular egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach. . . . "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus" *TXO*, 509 U.S. at 458, 113 S. Ct. at 2720 (quoting *Haslip*, 499 U.S. at 18, 111 S. Ct. at 1043). In most cases, the ratio will be

> within a constitutionally acceptable range, and remittitur will not be justified on this basis. When the ratio is a breathtaking 500 to 1, however, the award must surely "raise a suspicious judicial eyebrow."

BMW, 116 S. Ct. at 1602-03 (emphasis in original, citations omitted).

Particularly persuasive on this issue is a Seventh Circuit opinion in which two prisoners sued several prison guards for beating them and refusing to give them medical assistance. *Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996). A jury awarded each of the plaintiffs $5,000 in compensatory damages and $60,000 in punitive damages. *Id.* at 916. The defendants complained that the punitive damages award was excessive because it was twelve times the awarded of compensatory damages. *Id.* at 919. The court cited *BMW* in expressing that utilization of a mechanical ratio would not make good sense. *Id.* Furthermore, the court noted that "the smaller the compensatory damages, the higher the ratio of punitive to compensatory damages has to be in order to fulfill the objectives of awarding punitive damages." *Id.*

Crucial to the Seventh Circuit's decision to uphold the punitive damages awards are the following observations:

> The compensatory damages were low here in part because of the inherent difficulties of fixing a dollar equivalent for subjective injuries, such as fright and pain. An award of punitive damages proportioned to the low compensatory damages that were awarded would have a very meager deterrent effect, would fail to signal to the prison authorities that savage treatment of prisoners will not be tolerated, and would not be commensurate with the moral gravity of the defendants' actions.

Id. at 920.

The punitive damages awarded to Lowery and Peterson are not outrageously excessive and do not exceed what is required to serve the objectives of deterrence and punishment. First, ratios of 18 to 1 and 11 to 1 are not so high as to shock the judicial conscience, especially considering that the compensatory damages awarded are relatively low. Second, the seriousness and reprehensibility of intentional race discrimination in the workplace far outweighs a simple complaint that a new car was repainted before sale. In fact, there is no conceivable method for comparing the two situations. Finally, punitive damages of any lesser amount would have a "very meager deterrent effect" on Circuit City and other similarly situated corporations.

Consider this hypothetical. If the jury had chosen to use a factor of four (or even less), as Circuit City seems to urge, the award of punitive damages for Lowery would have been $50,000 at the most, and Peterson's punitive damages would have been $16,800. Certainly, this would not signal to Circuit City, or any other corporation for that matter, the intolerableness of intentional race discrimination in today's society. A penalty of $16,000 to $50,000 for discriminating against two employees is a drop in the bucket for a multi-billion dollar corporation such as Circuit City. At that rate, any corporation looking to make profits could conclude that it is cheaper to maintain the status quo, continue to discriminate, and dole out the few thousand dollar penalty. This is exactly the result that punitive damages are designed to combat. Thus, the Court concludes that the punitive damages awarded to Lowery and Peterson are appropriate, reasonable and not excessive, and Circuit City is not entitled to a remittitur of the awards.

SUMMARY

In sum, the evidence supports Lowery's $5,000 award of back pay and Peterson's $2,700 compensatory damages award. Additionally, the record supports an award of

punitive damages and the amounts awarded are not grossly disproportionate to the back pay and compensatory damages awarded to Lowery and Peterson. For all of the above reasons, the Court will DENY Circuit City's motion.

An appropriate Order shall issue.

/s/ James R. Spencer
United States District Judge

DATE: Mar. 12, 1997

[Filed Mar. 12, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISON

Civil Action Number 3:95CV964

SHELBY MCKNIGHT, *et al.*,
Plaintiffs,

v.

CIRCUIT CITY STORES, INC.,
Defendant.

ORDER

THIS MATTER is before the Court on defendant Circuit City's motion (1) to set aside the punitive damages awarded to plaintiffs Renee Lowery and Lisa Peterson, or in the alternative, for a remittitur of those awards, and (2) to set aside the back pay damages awarded to Lowery and the compensatory damages awarded to Peterson. For the reasons stated in the accompanying Memorandum Opinion, Circuit City's motion is hereby DENIED.

Let the Clerk send a copy of this Order to all counsel of record.

It is SO ORDERED.

/s/ James R. Spencer
United States District Judge

DATE: Mar. 12, 1997

APPENDIX F

[Filed Aug. 23, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISON

Civil Action Number 3:95CV964

SHELBY MCKNIGHT, *et al.*,
Plaintiffs,

v.

CIRCUIT CITY STORES, INC.,
Defendant.

MEMORANDUM OPINION

I. Introduction

THIS MATTER is before the Court on plaintiffs' motion to sever and bifurcate the jury trial scheduled to commence on October 28, 1996. Because of fairness and efficiency considerations, the Court will DENY the motion, DECERTIFY the class, and IMPLEMENT a new trial plan.

II. Procedural History

The above-entitled action was filed as an employment discrimination class action on October 31, 1995, in the United States District Court for the District of Maryland, Southern Division, in Greenbelt, Maryland. The putative class of plaintiffs in the action is comprised of current or former employees of Circuit City Stores, Inc. ("Circuit City") who are suing for discrimination in promotion and

transfer opportunities. The amended complaint describes Circuit City's alleged discriminatory practices as:

> making personnel decisions using procedures and criteria for selection that are excessively subjective and that are used for the purpose, and have the effect, of denying opportunities for promotion and transfer to qualified [black] employees [at Circuit City's Headquarters] because of their race and that are not related to the position in question and consistent with business necessity.

Pursuant to 28 U.S.C. §1404(a), district court in Maryland transferred the case to this Court on November 29, 1995. On April 1, 1996, plaintiffs moved to certify themselves as a class, and on April 30, 1996, the Court conditionally certified the class under Federal Rule of Civil Procedure 23(b), and subsequently set the case for trial by jury, to commence on October 28, 1996. On June 13, 1996, the Court approved plaintiffs' proposed letter to all class members, informing them of the conditional class certification, the trial date, and of a toll-free telephone number they could call to speak with plaintiffs' attorneys about the case. Discovery has been ongoing and plaintiffs have filed a list of 46 non-named class members who they plan to call as trial witnesses and acknowledged the existence of perhaps 200 additional class members with claims.

III. Statement of the Case

Plaintiffs have moved for the Court to sever the issues in this action and adopt a bifurcated trial plan whereby this case would be tried in two stages. Under plaintiffs' proposed plan, in Stage I, a single jury (the "Class Jury") would resolve separate issues in three phases, with the Class Jury's decision in each phase to be followed immediately by the trial of the next phase. The Class Jury would address the following issues during the three phases of Stage I:

Phase 1: The Class Jury in this phase would address class-wide liability issues, including specifically the issue of whether defendant Circuit City Stores engaged in a class-wide pattern or practice of racial discrimination with respect to promotions and transfers at its corporate Headquarters in Richmond.

Phase 2: During this phase, the Class Jury would determine the claims for compensatory damages of the named plaintiffs, and the Court would determine whether the named plaintiffs are entitled to any equitable remedies.

Phase 3: During Phase 3, the Class Jury would determine whether Circuit City is liable to the class for punitive damages and, if so, the amount of such damages to be awarded.

At the conclusion of Stage I, the Class Jury would be discharged and, if appropriate, the Court would grant any declaratory and/or injunctive relief. If there were a finding of class-wide discrimination by the Class Jury during Stage I, then Stage II proceedings would commence. These Stage II proceedings would occur in four phases as follows:

Phase 1: Within thirty (30) days of any verdict of class-wide discrimination by the Class Jury in Stage I, a notice would be sent, at Circuit City's expense, to each member of the class, together with a questionnaire requiring a response within thirty (30) days of receipt.

Phase 2: Following receipt of the questionnaires, the parties would be permitted to conduct limited discovery concerning class members' claims. The Court would determine at a later date the amount of time to be allotted for such discovery.

Phase 3: Following completion of defendant's additional discovery of class members, the class members'

claims would be tried to a series of separate juries ("Separate Juries"), each sitting for approximately two (2) weeks, until all claims of all class members have been heard. These Separate Juries would determine whether each class member was a victim of Circuit City's allegedly discriminatory conduct and if so, the amount of compensatory damages to be awarded to that class member. The Court would determine during these separate trials whether the class member is entitled to any equitable remedies.

Phase 4: Following completion of all claims of all class members by the Separate Juries, the Court would review the total amount of all compensatory damages and backpay awarded to both the named plaintiffs and the class members in Stages I and II of the trial, and compare it with the amount of punitive damages, if any, awarded by the Class Jury in Stage I. Thereafter, the Court would award each named plaintiff and each class member receiving compensatory damages and/or backpay, a portion of the total punitive damages approved by the Court following its review. The award would be in the same proportion that each claimant's compensatory damages and/or backpay bears to the total of all compensatory damages and backpay awarded to the named plaintiffs and all class members. Should the Court conclude, following its review, that the total amount of punitive damages awarded by the Class Jury is too large to be upheld under applicable law, the Court would order a remittitur of an appropriate portion of the punitive damages before they are distributed to the claimants.

IV. Analysis

A.

Defendant has opposed the proposed trial plan, claiming that it is unconstitutional, unfair, and unmanageable.

As noted above, the Stage I/Stage II bifurcation, with separate juries at both stages, will require separate juries to reexamine evidence and issues that a prior jury has decided. Defendant first argues that the Seventh Amendment of the United States Constitution forbids reexamination when the issues before the two juries are "interwoven." Citing a recent case from the United States Court of Appeals for the Seventh Circuit, defendant avers that plaintiffs' plan fails "to carve at the joint" and unconstitutionally "divide[s] issues between separate trials in such a way that the same issue is reexamined by different juries." *In the Matter of Rhone-Poulenc Rorer, Inc.* 51 F.3d 1293, 1302-03 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995) (citations omitted).

Defendant also contends that the Stage I jury could not properly assess punitive damages for the entire class rationally and fairly, an argument the Court agrees with and adopts. Plaintiffs want the Stage I jury to award punitive damages to the entire class based on evidence limited to (1) disparate treatment as to the class, and (2) actual harm and compensatory damages as to the named plaintiffs only. In other words, the first jury would make its determinations without the entire universe of information, including actual harm to the individual class members and information regarding defendant's potential legitimate non-discriminatory reasons for its allegedly adverse employment actions. This is not fair to the defendant. The essential issues of motive and intent, reprehensibility, and relationship of a class-wide punitive damages claim to proven harm would not be fully developed or decided until the contemplated Stage II trials, and could not be resolved as to the class as a whole until all those trials were complete.

Moreover Stage II anticipates the non-named class members claims being tried to a series of separate juries, sitting approximately two weeks at a time, until all the individual claims are heard. This method would prove to be no more expedient than the traditional handling of

civil cases. In addition, all of the evidence defendant may bring forth to rebut the individual claims would be relevant and admissible at plaintiffs' proposed Stage I, including Phases 1, 2, and 3. The same evidence would be relevant and admissible at the remaining separate trials in Stage II. Again, the proposal is inefficient and the Court declines to adopt plaintiffs' proposed trial plan.

B.

Having followed the case closely and gained a sense of the size of the class as well as the issues that must be hammered out, the Court concludes that Rule 23(b) class certification is not the most fair and efficient way to litigate plaintiffs' claims. Plaintiffs proposed trial schedule now makes it clear to the Court that the benefits of class certification, *i.e.*, accelerated and efficient disposition, will not necessarily follow in this case, but unfairness to the defendant *is* a likely result. Certainly there are cases where the sheer size of a class and the complexity of the common issues would lead a court to conclude that efficiency factors override certain considerations of fairness. Indeed, the fairness concerns that I have identified in this case are not of unconstitutional proportions. But they are factors a district court should consider in exercising the discretion inherent in Rule 23(b). Here, the efficiency problems, combined with the unfairness issues, lead the Court to determine that the class action procedure is not the best method of case management.

C.

With this in mind, the Court finds that the case can now best be handled in the following manner. The trial of the named plaintiffs' claims will proceed as scheduled on October 28, 1996, where the issues of individual liability, damages, and punitive damages will be litigated. The discovery deadline is extended until September 17, 1996, and dispositive motions must be filed no later than September 27, 1996.

At trial, the named plaintiffs will be allowed to produce evidence of pattern and practice discrimination, including evidence from the 46 non-named plaintiffs relevant to the issue of pattern and practice. Defendant will be permitted to put on a full defense to the pattern and practice claims. If there is a finding of pattern and practice discrimination, defendant will be collaterally estopped from denying the existence of such discrimination at subsequent trials. Future plaintiffs must file individual suits and pay the filing fees, reducing the number of frivolous and *de minimis* claims. The Court then may choose to consolidate some of the subsequent suits and try them in bulk as it sees fit.

V. Conclusion

When all is said and done, even if plaintiffs are able to establish that Circuit City's allegedly excessive subjective decisionmaking is a corporate device which makes individual cases of discrimination possible, or even probable, the focus of each individual plaintiff's proof, defendant's response to each plaintiff, and the jury's inquiry is whether each individual employment decision was motivated by intentional racial discrimination. The Court finds that it is more fair and efficient to handle the case as outlined and decertifies the class.

An appropriate Order shall issue.

/s/ James R. Spencer
United States District Judge

DATE Aug. 23, 1996

[Filed Aug. 23, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISON

Civil Action Number 3:95CV964

SHELBY MCKNIGHT, *et al.*,
Plaintiffs,

v.

CIRCUIT CITY STORES, INC.,
Defendant.

ORDER

THIS MATTER is before the Court on plaintiffs' motion to sever and to adopt a bifurcated trial plan. For the reasons stated in the accompanying Memorandum Opinion, the Court DENIES the motion, DECERTIFIES the class in this action, and IMPLEMENTS a new case management plan. In accordance with the trial plan outlined in the Memorandum, the discovery deadline is extended until September 17, 1996, and dispositive motions must be filed no later than September 27, 1996.

The Clerk is DIRECTED to send copies of this Order to all counsel of record.

It is SO ORDERED.

/s/ James R. Spencer
United States District Judge

DATE: Aug. 23, 1996

APPENDIX G

[Filed Apr. 30, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISON

Civil Action Number 3:95CV964

SHELBY MCKNIGHT, *et al.*,
Plaintiffs,

v.

CIRCUIT CITY STORES, INC.,
Defendant.

MEMORANDUM OPINION

THIS MATTER is before the Court on plaintiffs' motion for class certification. The putative class is comprised of current or former employees of Circuit City Stores, Inc. ("Circuit City") who are suing for discrimination in promotion and transfer opportunities. The amended complaint describes Circuit City's alleged discriminatory practices as:

> making personnel decisions using procedures and criteria for selection that are excessively subjective and that are used for the purpose, and have the effect, of denying opportunities for promotion and transfer to qualified [black] employees [at Circuit City's Headquarters] because of their race and that are not related to the position in question and consistent with business necessity.

For the reasons stated herein, the Court finds that the proposed class of plaintiffs satisfies the requirements of

Rule 23 of the Federal Rules of Civil Procedure and will GRANT plaintiffs' motion. The Court reserves its authority under Rule 23(c)(1) to restructure or decertify the class if subsequent events so warrant.

I.

CIRCUIT CITY'S CORPORATE STRUCTURE

Circuit City operates a nationwide chain of retail stores selling electronics and appliance products. Circuit City's Headquarters, located in Richmond, is housed primarily in two buildings known as "Deep Run One" and "Deep Run Two." Approximately 3,500 employees work in the buildings and approximately 2,600 of those workers are white and 800 are black. Other minorities account for the remaining 100-150 employees. There are six major departments at Headquarters and each department is headed by an Executive Vice-President and Senior Vice-President. Each of the departments and all of the 3,500 employees are directed by this small group of senior executives, all of whom are white. Most of the directors, managers and supervisors in all departments are white. Senior Vice-President William Zierden heads the Human Resources Department. Human Resources directs the formulation and implementation of Circuit City's policies and practices for promoting and transferring employees at Headquarters.

All parties agree that individual managers and supervisors make promotion and transfer decisions pursuant to subjective criteria, policies, and procedures. Any Headquarters employee who has people reporting to him or her has authority to grant a promotion or to select another employee or applicant to fill a vacant position. No one is required to approve a selection for it to become valid and Circuit City does not conduct any review of promotion decisions.

II.

STATEMENT OF THE CASE

Circuit City Stores, Inc. ("Circuit City") argues that the proposed class does not meet three of the requirements for class certification—commonality, typicality, and adequacy of representation—because the plaintiffs have failed to identify a specific act or practice that has caused the alleged injury. Circuit City maintains that the actual claims of the plaintiffs are unique and contain no common theme or logical connection.

Plaintiffs, on the other hand, argue that Circuit City maintains subjective promotion practices that have a similar discriminatory effect on black employees. This subjective decision-making is, according to plaintiffs, the common thread connecting the claims of the proposed class members and justifying class certification. Promotion and transfer decisions for employees at Headquarters are made by supervisors and managers who exercise "almost unfettered discretion" over all aspects of the promotion and transfer selection process. Circuit City has no uniform or written job descriptions for positions at Headquarters. Thus, there are no Circuit City policies or instructions governing those factors or information that may or should be considered by managers and supervisors when making a selection for a vacancy, or the weight to be given to such factors or information. The supervisor or manager making the decision has complete discretion to establish minimum qualifications necessary to be eligible or selected for promotion. Consequently, managers and supervisors are free to tailor job requirements to fit the abilities of applicants they wish to select.

But despite the discretion of individual managers, plaintiffs also maintain that Zierden and other senior executives have ample opportunity, by the support they provide, to communicate their discriminatory attitudes and prefer-

ences to the managers. To support their allegations, plaintiffs rely on statistical and anecdotal evidence addressing the class-wide impact of allegedly discriminatory practices.

First plaintiffs' expert, statistician Dr. Charles Mann, has performed a statistical analysis to demonstrate how Circuit City's subjective criteria and senior management prejudice have affected black employees. In short, Dr. Mann's analysis confirms that blacks remain in the lowest paying jobs at Circuit City and that comparisons in rates of promotion reveal disparities which imply that racial discrimination is at play.

Additionally, Circuit City executives allegedly have complained that blacks are not suited to be corporate managers. For example, plaintiff Renee Lowery, alleges that Zierden, head of Human Resources, told her "that when you hire black store managers, the whole store turns black, sales go down, customers come in and wonder what's going on." Deposition of Renee Lowery at 297. When Austin Ligon was senior vice president in charge of Corporate Planning, he told Lowery "Circuit City [is] not [a] very receptive . . . place for minorities and women." *Id.* at 296. Likewise, Larry Jones, an unsuccessful Headquarters applicant, alleges that Zierden told him in an interview that Circuit City would "rarely" bring blacks to Corporate Headquarters who had worked on the "sales floor" because "most blacks are incapable are [sic] performing at the corporate level," and because they were often involved in stealing in the stores. Declaration of Larry Jones.

Hence, plaintiffs contend that the subjective criteria utilized by managers combined with the racial animus of senior management provide the evidence of common disparate treatment and impact, warranting class certification.

III.

ANALYSIS

1. The Law of Class Certification

The critical issues before the Court are whether the plaintiffs have satisfied the commonality, typicality, adequacy of representation, and numerosity requirements of Fed. R. Civ. P. 23(a) in alleging that subjective decision-making processes have caused discrimination against black Circuit City employees.

As a collateral matter, it should be noted that the United States Supreme Court has cautioned against a review of the merits during the certification proceeding except as necessary to determine if the Rule 23 requirements have been satisfied. *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 177-78 (1974). In determining whether to certify the class the court must take the substantive allegations in the complaint as true. *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1995), *cert. denied*, 429 U.S. 816 (1976). Furthermore, given the requirement in Rule 23(c)(1) that a certification decision be made as soon as practicable after the commencement of the action, the standard of proof in support of certification tends to be liberal. Indeed, the Fourth Circuit has expressly recognized that requirements for class certification are to be liberally construed in favor of certification, especially because the court can always decertify or alter the class determination if later events so warrant. *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 740 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

a. Commonality Requirement

Rule 23(a) requires that plaintiffs make a "specific presentation identifying the questions of law or fact" that are common to the plaintiffs and the members of the proposed class. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 158 (1982). To satisfy the common-

ality requirement of Rule 23(a), this "specific presentation" must demonstrate that "the named plaintiff's claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id.* at 157 n. 13. In this case, the lynchpin of the class certification inquiry case hinges on the commonality element.

In *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988), the Supreme Court held that the use of subjective decision-making processes constitutes an employment practice subject to challenge in both disparate impact and treatment cases. Although the *Watson* Court did not address directly the issue of class certification in such cases, the Court's decision does support the position that a challenge to subjective decision-making is an employment practice that may present common questions of law or fact justifying certification.

For example, in *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326 (1983), the Fourth Circuit held that the use of subjective criteria can provide a common link among class members. In *Lilly*, the district court found that an overwhelmingly white supervisory force had wielded unlimited discretion, especially in that there were no written job descriptions. *Id.* at 331. Finding the district court's actions to be proper with respect to class certification, the Fourth Circuit stated:

> As to the commonality requirement, the complaint plainly alleged a practice of disparate treatment in the exercise of unbridled discretion, thus raising questions of law and fact common to all discharged employees . . . . We conclude, therefore, that the class . . . , under both § 1981 . . . was properly certified.

Id. at 333.

Although the *Lilly* court ultimately determined that the class of plaintiffs had not proven the merits of their case, the court nevertheless found that class certification was

appropriate where white supervisors exercised unbridled discretion in promotion and hiring. *Id.* at 333. In fact, the Fourth Circuit explicitly stated that certification was appropriate in *Lilly* because "certification is only concerned with the commonality (not the apparent merit) of the claims and the existence of a sufficiently numerous group who may assert those claims." *Lilly*, 720 F.2d 332-33.

Arguing that decentralized and autonomous decision making by individual departments managers does not satisfy the commonality requirements of Rule 23, Circuit City relies heavily on *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 277 (4th Cir. 1980). In *Stastny*, the Fourth Circuit reversed a class certification, saying that the "locus of autonomy" in making the challenged employment decisions was a "critical factor" in determining whether the commonality requirement was met. *Id.* at 279. The other critical factor was whether candidates for management positions came from a "statewide" workforce labor pool, or essentially from the workforce of each separate facility, or from some intermediate pool. *Id.* In denying statewide class certification, the court relied on the district court's findings that individual plants had local autonomy and separate labor pools.

Here, defendant states that Circuit City's promotions almost all occur within the same department or subdivision. Although the *Stastny* court was considering geographically separate facilities, Circuit City contends that the same local autonomy and local labor pool focus should apply to the autonomous individual managers in separate departments at Circuit City.

Plaintiffs argue that *Stastny* is inapplicable in this case because the *Stastny* plaintiffs challenged multiple facilities, whereas here, a single unit of Circuit City is involved—Headquarters. Notwithstanding Circuit City's contentions to the contrary, plaintiffs aver that Headquarters operates as a single unit. Management trainees rotate through dif-

ferent departments, inter-departmental transfers occur, and the same Human Resources department services all departments and managers at Headquarters. *See Shipes v. Trinity Industries*, 987 F.2d 311 (5th Cir. 1993) (commonality and typicality requirements met where two plants utilized the same subjective criteria at both facilities, white supervisors applied criteria at both facilities, employees were transferred between the two plants, and two plants used the same Employee Handbook); *Green v. USX*, 896 F.2d 801 (3d Cir. 1990) (upholding class certification where "[t]he district court found 'that the process by which [employer] divined who, among its applicants, were the best qualified, was wholly subjective, consisting of combining the gut reactions to the applicant of employees in the personnel office and one or more foremen in the plant.") (quoting *Green v. USX*, 570 F. Supp. 254, 269 (E.D. Pa. 1983)).

Moreover, unlike the plantiffs in *Stastny*, plaintiffs here allege an element of influence and control in the form of implicit directions by senior managers concerning how individual managers should exercise their discretion, another link among their claims of promotion and transfer denial.

Defendant also attacks Dr. Mann's statistical analysis, saying that it is unreliable, irrelevant, and incapable of demonstrating a pattern and practice of discrimination by Circuit City. For instance, Circuit City claims Dr. Mann's analysis does not support a claim of discrimination because he treats promotions as if they had all been made by a single decision maker at Headquarters, rather than by the dozens of individual managers and supervisors in different departments. *See Stastny*, 628 F.2d at 274 (rejecting statistical analysis because statistical data was not broken out into separate facilities).

Urging the Court to reject Dr. Mann's analysis, Circuit City relies on its own expert, Dr. Joan Haworth, who has concluded that there is a complete absence of a pattern

of adverse treatment against blacks at Circuit City. However, at this juncture, the Court cannot consider the merits of any parties' statistical results, but instead must accept Dr. Mann's analysis for purposes of class certification. A duel of the experts will play itself out at a later stage in the litigation process.

In sum, plaintiffs argue that Dr. Mann's observations and statistical analyses strongly suggest that black employees at Headquarters have confronted barriers to their advancement. Moreover, plaintiffs maintain that the managers' and supervisors' subjective decision making procedures comprise a common discriminatory link among the putative class members. These practices, coupled with the racial animus of white executives, permeate the corporate culture and have resulted in disparate impact and disparate treatment to black employees. These allegations are sufficient to satisfy the commonality requirement of Rule 23(a).

b. Typicality Requirement

In addition to establishing commonality, the individual plaintiffs must show that their claims are typical of the potential class. Determination of whether the name plaintiffs' claims are "typical" of the claims of potential class members is guided by *Falcon,* 457 U.S. 147 (1982). In *Falcon,* the Supreme Court rejected a lower court's "across the board" rule that an employee who suffers racial discrimination in any employment practice automatically may maintain a class action for all discriminatory employment practices. Instead, each case must turn on whether the individual claim of the named plaintiff and the claims of the class he purports to represent raise common questions of law or fact. *Id.* "[T]ypicality entails an inquiry whether 'the named plaintiff's individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based.' "

Green v. USX Corp., 843 F.2d 1511 (3d Cir. 1988) (citations omitted).

Applying *Falcon* the *Lilly* court found that the named plaintiffs' individual and class-wide claims overlapped on several pieces of proof: "the absence of written, objective criteria for promotions and terminations, the absence of regular job performance evaluations, and the presence of an overwhelming white supervisory force." 720 F.2d at 333-34. In the instant case, plaintiffs have alleged similar overlapping claims, leading the Court to determine that typicality is present among the putative class members' claims.

c. Adequate Representation Requirement

The adequacy of representation requirement incorporates two criteria: (1) the named plaintiffs must not have interests that are antagnostic to those of the putative class members and (2) the court must find that the class would represented [sic] by qualified counsel who will vigorously prosecute the action. *Rodger v. Electronic Data Sys. Corp.*, 160 F.R.D. 532 (E.D.N.C. 1995). Circuit City has demonstrated nothing to indicate that plaintiffs have not satisfied these criteria. As such, the Court finds that the named plaintiffs and their counsel will represent the putative class members adequately for purposes of Rule 23(a).

d. Numerosity Requirement

Plaintiffs maintain that they have satisfied Rule 23(a)'s numerosity requirement and that joinder is impracticable. There is no mechanical test for determining whether in a particular case the requirement of numerosity has been satisfied, but joinder should be impracticable. *Holsey v. Armour & Co.*, 743 F.2d 199, 217 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985). Reasonable estimates of class size are sufficient to show numerosity. In *Holsey*, the Fourth Circuit upheld class certification in an

employment discrimination suit where the company employed between 46 and 60 black employees annually. Likewise, the numerosity requirement was met where the employer employed some two hundred blacks and promoted over one hundred employees annually. *Lilly*, 720 F.2d at 333.

In the instant case, Circuit City employs approximately 3500 persons total, with about 800 blacks. Additionally, plaintiffs' attorneys claim they have received numerous calls from present and former black Headquarters employees who wish to join the class. Consequently, the Court finds that joinder is not practical in this case and the numerosity requirement has been fulfilled.

2. Can Plaintiffs Maintain a Rule 23(b)(2) or 23(b)(3) Class Action?

Upon satisfaction of the four requirements set forth in Rule 23(a), the Court must consider the type of class to be maintained under Rule 23(b). In their Complaint, plaintiffs have asserted that this action is maintainable under Rule 23(b)(2) or Rule 23(b)(3). Where a class is maintainable under both sections, courts prefer (b)(2) certification. Under Rule 23(b)(2), an action may be maintained as a class action if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).[1]

Here, plaintiffs have requested monetary damages in addition to injunctive relief. Arguing against 23(b)(2) certification, Circuit City avers that plaintiffs' prayers for monetary relief will dominate the proceedings because

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[1] Rule 23(b)(3) allows plaintiffs to maintain a class action where "questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

they will require separate calculations of each person's lost wages, back pay period, interim earnings, efforts to mitigate damages, as well as the amount of compensatory damages for individual emotional distress, humiliation, and embarrassment. While Rule 23(b)(2) only refers to declaratory and injunctive relief, a request for monetary relief will not defeat Rule 23(b)(2) class certification where injunctive relief is requested and predominates. Indeed, Rule 23(b)(2) certification is typically granted in employment discrimination cases, even where monetary damages are requested. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 801 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971) (Monetary relief is appropriate in class actions under Rule 23(b)(2).); *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 740 (4th Cir. 1989) ("[T]he Advisory Committee's Note suggestion that suit for damages is 'not appropriate' for class certification has proved unworkable and is increasingly disregarded.") As a result, the Court hereby certifies the class in accordance with Rule 23(b)(2).

IV.

CONCLUSION

Accordingly, the Court GRANTS plaintiffs' motion for class certification and CERTIFIES the class under Rule 23(b)(2). This certification is conditional. The Court may, if events so warrant, alter or decertify the class pursuant to Rule 23(c)(1).

An appropriate Order shall issue.

/s/ James R. Spencer
United States District Judge

DATE: Apr. 30, 1996

[Filed Apr. 30, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action Number 3:95CV964

SHELBY MCKNIGHT, *et al.*,
Plaintiffs,

v.

CIRCUIT CITY STORES, INC.,
Defendant.

ORDER

Upon consideration of plaintiffs' motion for class certification, the opposition of defendant, supplemental memoranda, and the record in this case, the Court hereby GRANTS the motion of the plaintiffs and CERTIFIES this action as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

/s/ James R. Spencer
United States District Judge

DATE: Apr. 30, 1996

APPENDIX H

Civil Rights Act of 1964
42 U.S.C. § 2000e-5(f) and (g)

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure, appointment of attorney; payment of fees, costs, or security intervention, stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this

section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, or governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge.

Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at

the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or person discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 1981a
Civil Rights Act of 1991

§ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) [42 U.S.C.A. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3) [42 U.S.C.A. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706 (g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)], from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000e-5 or 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations

implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the American with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act [42 U.S.C.A. § 12112 (b)(5)], against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)], from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12112(b)(5)] or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with

reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more caledar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means—

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 [42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of Title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) [42 U.S.C.A. § 12111 et seq.].

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

42 U.S.C. § 1981

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions, of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Supreme Court, U.S.
FILED
FEB 9 1999
CLERK

No. 98-972

In the Supreme Court of the United States

OCTOBER TERM, 1998

RENEE LOWERY, *et al.*, PETITIONERS

v.

CIRCUIT CITY STORES, INC., RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

In this case, in which the consolidated claims of several individual plaintiffs were tried, petitioners prevailed on only three of their 46 claims of employment discrimination in connection with promotions at Circuit City's 3,500-person headquarters. However, the jury was also permitted to find that Circuit City engaged in a "pattern or practice" of discrimination in promotions because its decision-making was decentralized and "excessively" subjective. The petition presents the following questions:

1. Whether the court of appeals correctly held that the district court did not abuse its discretion in decertifying a class composed of employees who sought damages based on promotion decisions made by numerous different supervisors and managers and involving widely differing positions.

2. Whether the court of appeals erred in modifying a sweeping injunction entered in reliance on a free-standing finding of a "pattern or practice" of discrimination, when only individual causes of action challenging separate promotion decisions made on a decentralized basis by different decision-makers were being adjudicated, the vast majority of which were found not to involve discrimination.

3. Whether the court of appeals correctly determined that petitioners' statistical study was not sufficient to carry their burden of demonstrating that Circuit City had offered pretextual reasons for particular promotion decisions.

4. Whether evidence that is only minimally sufficient to support a finding of discrimination necessarily also suffices to support imposition of punitive damages under 42 U.S.C. § 1981.

RULE 29.6 STATEMENT

Circuit City Stores, Inc., has no parent company or non-wholly owned subsidiary, but has two series of common stock. Circuit City Group common stock tracks the performance of Circuit City Stores, Inc., while CarMax Group common stock tracks the performance of CarMax Auto Superstores, Inc. CarMax Auto Superstores, Inc., is a wholly owned subsidiary of Circuit City Stores, Inc., which has retained an equity interest in CarMax Group common stock.

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In the Supreme Court of the United States

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RENEE LOWERY, *et al.*, PETITIONERS

v.

CIRCUIT CITY STORES, INC., RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT

Petitioners go to great lengths to obscure the hollowness of their case. Petitioners were never able at trial to identify any discriminatory policy or practice at Circuit City headquarters, where the racial composition of the workforce belied any claim of systematic discrimination. Instead, petitioners contended that the company's decentralized, non-bureaucratic approach to promotions permitted individual supervisors to engage in specific acts of intentional discrimination in making promotions for widely varying positions. Petitioners could not prove that widespread intentional race discrimination in promotions in fact had occurred, however, or that the absence of rigid promotion criteria had caused any discrimination to take place. They now seek to enlist this Court in their effort to bypass their burden of proof.

1. Respondent Circuit City Stores, Inc., operates a chain of retail consumer electronics stores. At the time of trial, Circuit City employed approximately 3,500 people at its headquarters, about 800 of whom were African-Americans. Pet. App. 4a. The headquarters is organized into about a dozen

divisions and subdivisions and more than 100 departments. C.A. App. 1858, 2948. Hundreds of headquarters employees work for a subsidiary, First North American National Bank ("FNANB"), which has its own human resources department and policies. *Id.* at 2216, 2684-2686; Pet. App. 4a.

Circuit City has grown quickly. To keep pace with that growth, Circuit City, like other companies in similar circumstances, has implemented personnel practices that limit regimentation and bureaucracy and give managers and employees wide freedom of action. Pet. App. 5a; C.A. App. 2680-2681. Thus, Circuit City does not use written job descriptions; jobs change too quickly. C.A. App. 2688. Employees are regularly evaluated, however, and promotions are based on several factors, including performance, experience, time in position, and education. See *id.* at 1629-1633, 1819-1820, 1853, 2213, 2874-2875, 2951-2953.

For promotions as for many other functions, Circuit City places most if not all responsibility on the immediate supervisor. C.A. App. 2202-2204, 2682. As the Fourth Circuit noted, this policy of decentralized decisionmaking has "strong support among management experts." Pet. App. 5a. Indeed, such "[n]onbureaucratic forms of organization and management" are "hallmarks of rapid-growth companies." Albert, *Human Resources Profit Power: Human Resources, Financial Growth Linked*, 67(2) PERSONNEL 47 (1990). This flexibility in hiring and promotions is linked to a clear non-discrimination policy, in support of which Circuit City requires supervisors to attend a week-long seminar that instructs them in appropriate, non-discriminatory management practices. See Pet. App. 5a.

Circuit City's policies have produced a racially diverse workforce at headquarters. Undisputed evidence showed that, "for each significant occupational category defined by the United States Census Bureau, Circuit City employs more African-Americans than the external labor pool would indicate." Pet. App. 6a. For example, within the "Officials and

Managers" category, over 9% of Circuit City's 375 hires between 1992 and 1995 were African-Americans, while the relevant pool was only 4% African-American. *Ibid.* It also was undisputed that, during the relevant period, the 178 promotions received by African-Americans amounted to 18% of all promotions at Circuit City headquarters, and, even more significant, 25% of promotions in which both blacks and whites were in the candidate pool; during the same period, the average proportion of African-Americans in the full-time workforce was about 19%. C.A. App. 1854-1855, 2962.

2. Despite these circumstances, petitioners' counsel spent 30 months vigorously recruiting clients for a class action against Circuit City from the more than 1,500 African-Americans who worked at headquarters between 1992 and 1995. See C.A. App. 230-231. The cases that were consolidated into this action in the Eastern District of Virginia asserted 50 instances of alleged discrimination in hiring, transfers and promotions at Circuit City headquarters; the nine petitioners accounted for 46 of the 50 claims. Pet. App. 13a. Petitioners alleged that Circuit City's failure to use more formal and centralized personnel procedures amounted to a "pattern or practice" of racial discrimination under both disparate impact and disparate treatment theories.

The district court initially certified a mandatory, non-opt-out class comprising all African-Americans who had been employed at Circuit City headquarters after April 1992. Pet. App. 14a. Having certified the class, the district court effectively prevented Circuit City from marshaling evidence from the many African-Americans who *had* been promoted, in order to counter petitioners' claim that Circuit City engaged in pervasive discrimination. Thus, Circuit City's counsel were not allowed to communicate about the litigation with *any* of the company's African-American employees, whether or not they claimed to have suffered discrimination, except with prior consent of class counsel or the district court. *Id.* at 36a-37a. The district court refused to lift its gag order except as to

persons involved in particular decisions challenged by a named plaintiff, to one plaintiff's current supervisor, and to the secretary for the in-house lawyers responsible for the case.

Petitioners proposed a seven-phase trial plan. Pet. App. 105a-107a. After considering this proposal, the district court *sua sponte* decertified the class, noting "problems of fairness and efficiency." *Id.* at 14a. Nonetheless, the court continued to bar Circuit City from trying to contact sympathetic African-American employees. See C.A. App. 618. The district court also granted summary judgment against three petitioners on all their claims. Pet. App. 16a.

When the trial began, the district court reminded the parties that the case was "no longer a class action" (C.A. App. 2042) and "re-emphasized the procedural posture of the case, stating that '[t]his is a case involving six individual plaintiffs. . . . Don't misunderstand.'" Pet. App. 16a. Petitioners were permitted to introduce evidence of a "pattern or practice" of discrimination to support their individual claims. *Id.* at 6a. In fact, however, petitioners could not point to any particular offensive practice. They instead insisted that "Circuit City's insufficiently regimented management practices" (*id.* at 16a) had made "individual cases of discrimination possible" (*id.* at 110a) in a context in which dozens of supervisors were choosing whom to promote to dozens of widely dissimilar positions.

To support this conjecture, petitioners presented a diversity consultant who testified that Circuit City's non-bureaucratic style did not comport with his view of the "best practices," in part because supervisors could rely on subjective as well as objective criteria in choosing whom to promote.[1] C.A. App.

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[1] Although the consultant's testimony (and part of the decree that was modeled on that testimony, see Pet. App. 87a) transplanted to personnel procedures an academic fad for "best practices" in manufacturing operations, such centralized, one-size-fits-all solutions have not stood the test of time. See Pilkington, *Manufacturing Strategy Regained: Evidence for the Demise of Best-Practice*, CALIF. MGMT.

1031, 2726-2732, 2779-2782. In the opinion of this "expert," one of Circuit City's shortcomings was its failure to hire a full-time diversity specialist of its own. See *id.* at 2775-2777. The diversity consultant conceded that there was no "empirical evidence" that the practices he favored would produce less discrimination than Circuit City's system. *Id.* at 2816-2817.

Petitioners also presented a statistical study that failed to control for education, performance, or job experience. See Pet. App. 35a-36a; C.A. App. 1015, 2600, 2608-2609. The district court shielded the statistician's testimony from effective cross-examination, however, by refusing to permit access to the data runs, computer programs, and codes on which the testifying expert's opinions were constructed, on the theory that the materials were prepared by other, non-testifying experts and therefore were not discoverable. C.A. App. 509; see Pet. App. 38a-39a.

In addition, petitioners relied on certain "assumption[s]" made by two amateur surveys, along with a selection of hearsay records of employee complaints received in the course of the surveys. Pet. App. 7a-9a. One of the surveys was limited to FNANB, while the other related only to the retail stores and had nothing to do with headquarters. Petitioners also testified about a few discriminatory stray remarks that were not related to any contested promotion decision and that the declarants denied making. And petitioners paraded 17 non-plaintiff employees into court who testified to their subjective belief that various workplace disappointments resulted from discrimination. See *id.* at 16a-17a.[2]

REV., Fall 1998, at 31.

[2] Circuit City demonstrated the legal insufficiency (and irrelevance) of the anecdotal complaints in its opening brief to the court of appeals (at 25-26). Petitioners and their anecdotal witnesses challenged promotions in a dizzying array of clerical, professional, and management positions: account representative, accounting clerk, return check processor, assistant supervisor of collections, assistant supervisor of

Even in their own, carefully selected individual cases, however, petitioners had great difficulty proving that the discrimination supposedly made possible by Circuit City's "insufficiently regimented" procedures actually had occurred. Indeed, the district court granted Circuit City judgment as a matter of law on the claims of three petitioners at the close of the plaintiffs' case. Pet. App. 17a.

At the end of the trial, the district court instructed the jury to decide "first of all" whether Circuit City had engaged in a "pattern or practice" of discriminatory promotions *before* considering whether the three remaining petitioners had established *any* of their individual discrimination claims. C.A. App. 3125-3126; Pet. App. 18a. The district court intended this interrogatory to support a species of one-way class action. If the jury returned a "finding of pattern or practice discrimination, the district court stated that Circuit City would be collaterally estopped from denying the existence of such discrimination at subsequent trials." Pet. App. 16a. On the other hand, a verdict for Circuit City on the "pattern or practice" question would not affect future litigation brought by non-parties.

Presented with the separate "pattern or practice" interrogatory as a preliminary step to finding liability in any individual case, see Pet. App. 18a, the jury found a "pattern or practice" in the abstract — but then rejected 12 of the 15 concrete claims of discrimination that were before it, including both of petitioner McKnight's claims. See *ibid.* The jury found that, in three instances, Circuit City had discriminated by promoting other women ahead of petitioners Lowery and Peterson, and it awarded a total of $16,700 in back pay and compensatory damages. After being instructed that the "[c]ivil rights laws are difficult to enforce without the threat to defendants of liability

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various customer service functions, media assistant, project coordinator, graphic artist, financial reporting analyst, supervisor, and manager.

for punitive damages" (C.A. App. 3121), the jury awarded a total of $272,000 in punitive damages. *Ibid.*

After trial, the district court entered judgment for Circuit City on petitioners' disparate impact claim, holding that they had failed to identify any "specific elements" of Circuit City's promotion practices that "ha[d] a significant disparate impact on African-American employees." C.A. App. 706 (omitted from petitioner's appendix). In an unprecedented procedural innovation, however, the district court relied on the jury verdict to enter a free-standing "judgment" (also omitted from petitioners' appendix) that Circuit City had engaged in a "pattern or practice" of *intentional* discrimination. *Id.* at 700.

Based on that "judgment," the district court ordered Circuit City to restructure personnel procedures at headquarters along the lines suggested by petitioners' diversity consultant. The sweeping decree broadly prohibited Circuit City from "taking any adverse employment action against any African American employee" and required Circuit City to hire specialists in employment diversity, to adopt race-based mentoring programs, to engage in detailed record-keeping (to be measured against *de facto* quotas), and to submit to continuing oversight by petitioners' counsel and experts, as well as by the court itself. See Pet. App. 19a-20a; 80a-88a. The district court also ordered specific relief for petitioner Lowery (petitioner Peterson having left Circuit City), and awarded petitioners' counsel nearly $4 million in attorneys' fees and costs. See *id.* at 21a.

3. The Fourth Circuit stayed the decree pending appeal, except for the injunctive provisions specific to Lowery. Pet. App. 21a. On the merits, a unanimous panel (Murnaghan, Wilkins, and Hamilton, JJ.) affirmed in part and vacated in part.

The court of appeals affirmed the district court's decision to decertify the purported class, rejecting petitioners' argument that the district court somehow had "los[t] its discretion" to do so. Pet. App. 22a. Observing that "efficiency is one of the primary purposes of class action procedure," *id.* at 24a n.5, the

court of appeals held that the district court appropriately exercised its discretion to decertify the purported class based on "legitimate concerns that trying the suit as a class action would be unwieldy and unfair to Circuit City." *Id.* at 24a.

The court of appeals also vacated the free-standing "pattern or practice" "judgment." It acknowledged that individual plaintiffs "may use evidence of a pattern or practice of discrimination to help prove claims of individual discrimination." Pet. App. 29a. Nevertheless, "individuals do not have a private, non-class cause of action for pattern or practice discrimination under § 1981 or Title VII" separate from their claims for relief from discrimination they themselves may have suffered. *Id.* at 26a.

The Fourth Circuit affirmed the jury verdict against petitioner McKnight and the dismissal of all claims made by six other petitioners. It explained that four of the dismissed petitioners "failed to establish a prima facie case of discrimination" (Pet. App. 32a), while the other two "failed to demonstrate that Circuit City's articulated reasons for passing them up for promotion were pretextual" (*id.* at 33a). The court held that petitioners' statistical evidence was insufficient to show pretext because the study did not "adequately control for factors other than race that could account for the disparity in promotions at Circuit City," "notabl[y]" including the effect of "educational level * * * on promotions at Circuit City." *Id.* at 35a.

Next, the court of appeals affirmed, without analysis, the judgments in favor of petitioners Peterson and Lowery. Pet. App. 36a n.7. It then held, however, that the record evidence was "simply insufficient" to prove "conduct exhibiting 'malice, an evil motive, or recklessness or callous indifference to a federally protected right.'" *Id.* at 39a, 40a. The record clearly showed "that Lowery and Peterson had problems that, at least partially, led to their being passed up for promotion." *Id.* at 40a. Those problems included Peterson's "deficient" performance "during her two rotations as assistant supervisor" (*id.* at 12a)

and Lowery's shortcomings in training recruiters, providing leadership, and coherent communication (see *id.* at 9a-10a). That evidence, which made liability borderline, rendered the "extraordinary remedy of punitive damages * * * not appropriate" in the absence of "egregious" conduct. *Id.* at 40a.

Given the very limited number of successful claims, the court of appeals substantially narrowed the district court's injunction, leaving in place only the provisions relating to petitioner Lowery. Pet. App. 40a. It vacated the extensive provisions mandating that Circuit City create a "Department of Diversity Management" and implement a wide variety of other programs "subject to Plaintiffs' approval, for which Plaintiffs' counsel [could] apply quarterly for fees and expenses incurred in the monitoring and enforcement of the order." *Id.* at 41a. These "class-wide remedies" with their "labyrinthine provisions for reporting and enforcement" amounted to an abuse of discretion because they "far surpass[ed] those needed — and [we]re far more burdensome than needed — to provide the prevailing Plaintiffs with complete relief." *Id.* at 41a.

Although the Fourth Circuit recognized that "occasionally individual relief equates to class-wide relief" (Pet. App. 41a), that was not the case here, and the vacated "pattern or practice * * * 'claim'" provided no basis for "such broad and sweeping relief." *Id.* at 42a. The court also identified flaws in other parts of the decree ranging from the "go-thy-way-and-sin-no-more provision" that would "impermissibly subject[]" Circuit City "to contempt proceedings for conduct unlike and unrelated to the violation with which it was originally charged" (*ibid.*), to the segregated "career development and mentoring program" for African-Americans only (*id.* at 41a-42a), to the provision that "on its face * * * would prevent Circuit City from taking" any adverse action against any African-American employee "even if the employee indisputably merited the adverse action and the action was undeniably nondiscriminatory." *Id.* at 42a.

Finally, the court of appeals vacated the award of nearly $4 million in attorneys' fees and costs. It noted that "of the fifty claims filed, the Plaintiffs prevailed on only three," manifesting "a very low degree of success." Pet. App. 44a, 43a.

ARGUMENT

By no criterion does this case warrant further review. The decision below, and the questions actually presented by it, are far narrower than petitioners suggest. The Fourth Circuit's resolution of the challenged issues is correct and does not conflict with decisions of other courts of appeals. Indeed, the issues that were resolved below have received scant appellate attention. That is no surprise, for this case was characterized at the trial level by unusual legal theories and procedural rulings that have no currency elsewhere in employment discrimination law.

Petitioners alleged 46 individual acts of discrimination in promotions at Circuit City's headquarters; *43 of those claims were rejected in the district court.* Perhaps driven by necessity born of the dearth of evidence of actual discrimination, petitioners put forward a theory of "pattern or practice" discrimination, asserting that a *lack* of bureaucratic procedures — procedures that even petitioners' expert conceded had not been shown to reduce discrimination — made it *possible* for supervisors and managers scattered across a hundred departments to discriminate intentionally when filling hundreds of vastly different jobs.

The court of appeals correctly rejected petitioners' unprecedented attempt to rely on that "pattern or practice" to avoid their burden of proof under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and to restructure Circuit City's entire promotion system. Instead, it provided the two petitioners actually found to have suffered isolated acts of discrimination with complete make-whole damages and appropriate injunctive relief, but otherwise rejected petitioner's claims.

I. THE FOURTH CIRCUIT'S AFFIRMANCE OF THE DISCRETIONARY DECERTIFICATION OF THE PLAINTIFF CLASS PRESENTS NO GROUND FOR REVIEW

In language that typifies petitioners' seemingly ceaseless resort to hyperbole, the first question in the petition suggests that the decision below "foreclos[ed] all procedural avenues by which victims of an intentional pattern or practice of racial discrimination may obtain both class-wide injunctive relief and monetary damages." Pet. i. The Fourth Circuit did nothing of the kind. It simply held that the district court did not abuse its *discretion* when it required *these plaintiffs* to forgo the class mechanism in *this case*. Pet. App. 25a. That unremarkable and fact-bound determination presents no basis for further review.

A. This Court has emphasized that Rule 23 of the Federal Rules of Civil Procedure vests "broad power and discretion" in district courts "with respect to matters involving the certification and management of potentially *cumbersome* or frivolous class actions." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345 (1979) (emphasis added). The Court recognized that only "sound discretion and use of the tools available" could prevent "administrative chaos" and "class-action harassment." *Ibid.* Petitioners take issue with this view. They suggest that the Court should second-guess the Fourth Circuit's entirely unremarkable holding that, under the unusual circumstances of the disparate "class" that petitioners proposed here, the district court acted within its discretion in decertifying the class precisely because it was cumbersome and inefficient.

The petition exhaustively recites (Pet. 8-13) the history and general policy underlying employment discrimination class actions in an effort to distract the Court from the fundamental peculiarity of *this* case and the soundness of the decision below. As the Fourth Circuit recognized, the broad principles on which petitioners rely are "beside the point." Pet. App. 25a. The petition simply ignores what it cannot controvert: the disparate

plaintiffs' individual requests for significant compensatory and punitive relief would have made class treatment inefficient, unmanageable, and unfair. *Id.* at 24a-25a.

Petitioners assert (Pet. i, 19) that the decision below would prevent *any* employment discrimination plaintiff from seeking both individual damages and broad injunctive relief. That is not so. The closest thing to a common thread linking petitioners' claims was the assertion that Circuit City should have tried to make it harder for supervisors to stray into specific discriminatory actions by using an array of bureaucratic procedures of unproven and highly doubtful efficacy. Nothing in the decision below forecloses the ability, in a much different case, of a more cohesive, sensibly constituted class of discrimination plaintiffs — or, for that matter, an individual plaintiff for whom equitable relief depended on the eradication of an identifiable practice (see Pet. App. 41a) — to seek both monetary and injunctive relief.

B. Petitioners ask this Court to grant review to consider their proposition that *any* set of plaintiffs who append a prayer for employer-wide injunctive relief to their assertions of individual discrimination *must* be certified as a class. The Fourth Circuit properly rejected the view that district courts somehow "lose[] their discretion to certify or decertify [a] class" in the face of such complaints (Pet. App. 22a), and petitioners offer no support for such an extreme view here. Indeed, as the Fourth Circuit observed, this "Court has rejected the proposition that merely alleging a pattern or practice of discrimination automatically entitles plaintiffs to class certification." Pet. App. 25a, citing *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 155-157 (1982), and *East Texas Motor Freight Systems* v. *Rodriguez*, 431 U.S. 395, 405-06 (1977).

Petitioners do not identify a single conflicting decision by a court of appeals reviewing the class certification of discrimination plaintiffs who sought significant monetary damages as well as injunctive relief. Indeed, the only courts of appeals to

address similar attempts to misuse the class action device have likewise held that class certification is *not* mandatory, if anything taking a stronger stand against such proposals. See *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998); *Jackson* v. *Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997).

In *Allison*, the Fifth Circuit affirmed a district court's refusal to certify a class of employment discrimination plaintiffs who were dispersed across multiple "skill groups" and "functional areas" and who asserted commonality based on "challenging general hiring, training and promotional policies," such as "use of subjective decision-making." 151 F.3d at 407. The Fifth Circuit affirmed the district court's exercise of its "substantial discretion in determining whether to certify a class action" (*id.* at 408), relying in part on the problems of "efficiency and manageability" presented by the proposed class (*id.* at 415). The Fifth Circuit concluded, consistently with the decision here, that class certification may be denied where a widely heterogeneous class of employees seeks both monetary and injunctive relief. *Id.* at 418. In fact, the Fifth Circuit went further than the court below, holding that in such cases injunctive relief plainly is not predominant, so that a district court would necessarily abuse its discretion if it *did* certify a plaintiff class. See *id.* at 415-418.

Likewise, the Eleventh Circuit in *Jackson* issued a writ of mandamus to decertify a class consisting of persons claiming that a motel chain discriminated against them. Although the plaintiffs in *Jackson* sought injunctive relief against a supposed "practice or policy" of discrimination as well as damages, the court did not find Rule 23(b)(2) to be even "arguably fulfilled" by such a disparate class of damages-seeking plaintiffs (130 F.3d at 1005), presumably because the injunctive relief against the alleged practice was not predominant over the damages claims (see *id.* at 1005-1006). The court revoked certification after finding that Rule 23(b)(3) also was not satisfied.

Petitioners concede that class certification may be denied whenever "monetary relief" is "predominant." Pet. 13. Yet, throughout this litigation, petitioners suggested that dozens or hundreds of class members would press damages claims. Indeed, petitioners' failed effort to extract a $15 million settlement from Circuit City (see C.A. App. 4361-4363) confirms that petitioners placed primary emphasis on the pecuniary aspects of this case. The fairness, efficiency and manageability concerns cited by the district court, and reiterated by the court of appeals, all flow from the fact that common injunctive relief did not at all predominate over the individual, damages-related issues.

Petitioners also maintain (Pet. 14, 20) that the affirmance of the district court's discretionary decertification somehow amounts to "the sort of 'judicial inventiveness' that this Court disapproved in" *Amchem Products, Inc.* v. *Windsor*, 117 S. Ct. 2231 (1997). Petitioners turn *Amchem* squarely on its head when they attempt to make that decision, which *limited* the scope of permissible class certification, into the basis for making class certification *mandatory* whenever an omnibus damages action also asserts a claim for injunctive relief. In *Amchem* this Court forbade lower courts to *waive* the *minimum* requirements of Rule 23 in order to certify classes for settlement. Nothing in *Amchem* suggests that any case that arguably meets the requirements of Rule 23 *must* be certified as a class action regardless of the circumstances or alters the longstanding recognition that a district court should not maintain a class action that does not "advance the efficiency and economy of litigation which is a principal purpose of the procedure." *Falcon*, 457 U.S. at 159 (quoting *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 553 (1974)). To the contrary, in *Amchem* this Court reiterated the universal view that "Rule 23(b)(2) *permits*" — but does not require — "class actions for

declaratory or injunctive relief." 117 S. Ct. at 2245 (emphasis added). The decision below accorded with precedent.[3]

C. Petitioners try to manufacture a circuit conflict by insisting that the decision below allows district courts to "graft the Rule 23(b)(3) requirements" of manageability, fairness, efficiency and superiority "onto Rule 23(b)(2)." Pet. 14. Petitioners must hope that this Court will overlook the Fourth Circuit's express disavowal of any such holding: "[W]e do not mean to imply that the factors for certifying a Rule 23(b)(3) class should be imported into Rule 23(b)(2) classes." Pet. App. 24a n.5. Rather, the court of appeals continued, in terms that echo this Court's instructions in *Sonotone*, 442 U.S. at 345, that "because efficiency is one of the primary purposes of class action procedure, * * * in appropriate circumstances a district court may exercise its discretion to deny certification if the resulting class action would be unmanageable or cumbersome." Pet. App. 24a n.5.

The actual holding of the Fourth Circuit renders irrelevant the supposedly conflicting statements made by other courts of appeals in decisions, rendered outside the discrimination context, where proof of plaintiff-specific damages was *not* at issue. The feasibility of class treatment is quite different when an action seeks *only* injunctive relief, or injunctive relief combined with incidental restitutionary remedies that are "capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances." *Allison*, 151 F.3d at 415 (distinguishing *Forbush* v. *J.C. Penney Co.*, 994 F.2d 1101, 1105 (5th Cir. 1993)).[4] That describes the cases

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[3] The only way in which the district court "invent[ed a] new form[] of class action[] that w[as] not contemplated by Congress" was to favor *petitioners* by creating an "alternative procedural mechanism * * * intended to give the class" — but *not* Circuit City — "approximately the same benefits as class certification." Pet. 16, 20.

[4] Petitioners claim that *Forbush* conflicts with the decision below,

cited at Pet. 19-20, in which courts said, in full accordance with the decision below, that compliance with all of the factors enumerated in Rule 23(b)(3) was not a general *prerequisite* to *eligibility* for certification under Rule 23(b)(2).[5] The asserted conflict is illusory — and at any rate has nothing to do with class actions seeking damages for an alleged "intentional pattern or practice of racial discrimination." Pet. i.

II. THE FOURTH CIRCUIT'S MODIFICATION OF THE INJUNCTION IN THIS CASE PRESENTS NO BASIS FOR FURTHER REVIEW

Petitioners suggest that because this is a civil rights case, there are no limits on the scope of injunctive relief. To the contrary, the Fourth Circuit correctly applied settled equitable principles to the unusual facts of this case in narrowing the decree to what could be justified in order to afford prevailing plaintiffs complete relief.

A. The Fourth Circuit confronted a decree that, to remedy three isolated instances of discrimination — two denying the same promotion to the same person — ordered Circuit City to "revise its program of promoting employees" throughout its hundred departments and submit to having all promotions

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but the Fifth Circuit amply distinguished the issues in *Allison* (which track the issues in this case) from those in *Forbush*. See 151 F.3d at 415. Any tension among Fifth Circuit decisions is a matter for that court — which declined to rehear *Allison* en banc, *id.* at 434. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

[5] See *Penland* v. *Warren County Jail*, 797 F.2d 332, 334 (6th Cir. 1986) (injunctive relief for jail conditions); *Norris* v. *Frame*, 585 F.2d 1183, 1189 n.18 (3d Cir. 1978) (injunctive relief for pre-trial detainees; dictum on class certification); *Alliance to End Repression* v. *Rochford*, 565 F.2d 975, 976 n.2, 979 (7th Cir. 1977) (challenge to police surveillance; damages not certified); *Elliott* v. *Weinberger*, 564 F.2d 1219 (9th Cir. 1977) (challenge to government benefits recoupment procedure, damages not awarded), aff'd in part and rev'd in part *sub nom. Califano* v. *Yamasaki*, 442 U.S. 682 (1979).

evaluated against a *de facto* quota; to create and staff a "Department of Diversity Management"; to comply with "labyrinthine provisions for reporting and enforcement"; to submit "[m]any aspects of the new programs * * * to Plaintiffs' approval"; and to pay "Plaintiffs' counsel * * * quarterly for fees and expenses incurred in the monitoring and enforcement of the order." Pet. App. 41a, 83a-87a. The Fourth Circuit's catalogue of these and other astounding aspects of the decree speaks for itself. See *id.* at 40a-42a.

Petitioners provide no sound reason for this Court to second-guess the Fourth Circuit's unremarkable conclusion that "such sweeping remedies far surpass those needed — and are far more burdensome than needed — to provide the prevailing Plaintiffs with complete relief." Pet. App. 41a. Indeed, there was *no* showing at trial that a lack of bureaucratic procedures at Circuit City actually caused any discrimination, or that the imposition of such procedures would reduce it. The Fourth Circuit's approach is completely in line with this Court's jurisprudence unequivocally limiting injunctive relief to the scope necessary to remediate "the injury-in-fact that" a private "plaintiff has established." *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996). Certainly, as this Court held in *Lewis* — which *was* a class action — "two instances of actual injury" do not warrant system-wide injunctive relief, *id.* at 356, no matter how broadly the offending "practice" may be characterized.[6]

The petition quotes (at 26) a misleading patchwork of broad statements about make-whole relief and suggests that the court of appeals' decision to narrow the unprecedented injunction in this weak case somehow conflicts with decisions of this

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[6] Petitioners prudently do not contest the Fourth Circuit's disposition of some of the more extreme elements of the decree, such as the effort to convert the entire corpus of federal civil rights legislation into the basis for contempt proceedings against Circuit City, the race-specific mentoring program, and the forbidding of *any* adverse action against *any* African-American employee. Pet. App. 41a-42a.

Court. In a few government cases and class actions, this Court has upheld system-wide remedies altering specific, identified practices with specific discriminatory effects, such as the seniority systems modified in *Teamsters* v. *United States*, 431 U.S. 324 (1977), and *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 779 (1976). Petitioners — who could never pinpoint an enjoinable practice that had a discriminatory effect — can identify no precedent that approaches the breadth and intrusiveness of the injunction narrowed by the Fourth Circuit here.

Not only was the relief in each of the cited cases more closely tailored to the violations at hand, but those cases bore no resemblance to this one. By contrast with petitioners' case, which relied on shaky statistics to support a theory that insufficiently regimented personnel practices permitted individual decisionmakers to discriminate in individual instances, the decisions of this Court on which petitioners rely involved years of "overt segregation," *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 409 (1975), and "longstanding or egregious discrimination" including contemptuous resistance to prior anti-discrimination decrees. *Sheet Metal Workers* v. *EEOC*, 478 U.S. 421, 448 (1986); see *United States* v. *Paradise*, 480 U.S. 149, 153 (1987). In the circumstances of this case, the Fourth Circuit appropriately limited the decree to an "award [of] make-whole relief to the individuals" who were provably "victimized." *Sheet Metal Workers*, 478 U.S. at 448.

B. Incredibly, petitioners claim (Pet. 27) that the decision below conflicts with a dictum in *Meyer* v. *Brown & Root Construction Co.*, 661 F.2d 369 (5th Cir. 1981). In *Meyer*, the Fifth Circuit reversed the *entire* injunction at issue (*id.* at 374), but stated that in some other, hypothetical cases "injunctive relief designed to assist a party will accidentally assist persons not before the court" (*ibid.*). Likewise, the Fourth Circuit explicitly acknowledged that, when a specific, identifiably discriminatory practice has injured an individual plaintiff, "individual relief equates to class-wide relief," Pet. App. 41a, and prior decisions have taken that tack. *E.g.*, *Evans* v. *Harnett County*

Board of Education, 684 F.2d 304, 306 (4th Cir. 1982) (relief awarded in individual action enjoined school district from hiring and assigning principals based on race). That was not the case here, where the injunction simply reproduced the predilections of petitioners' diversity consultant, who admitted that he had no evidence that his favored procedures actually reduced discrimination. Even if conflicting dicta could support review, there is no conflict here.

C. Petitioners suggest that the Fourth Circuit was foreclosed from vacating the more extravagant portions of the district court's decree because the jury had found a free-standing "pattern or practice" of discrimination before rejecting 12 of the 15 alleged instances of actual discrimination that were before it. The Fourth Circuit held that, although "[e]vidence of a pattern or practice of discrimination" might be probative of individual claims (see Pet. App. 29a-30a), there is no such thing as a free-standing "pattern or practice" cause of action or judgment in an individual case. Accordingly, the jury's separate finding could not justify relief broader than that appropriate for the two prevailing individual plaintiffs.

Petitioners purport to discern a conflict on this point between the decision below and a passing "thought" (Pet. 21) — *i.e.*, dictum — in *Cox* v. *American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986), cert. denied, 479 U.S. 883 (1986). The Fourth Circuit accurately recognized that its holding was "not in conflict" with *Cox*. Pet. App. 31a. The Eleventh Circuit *held* in *Cox* that the plaintiff class had to be recertified (784 F.2d at 1558); only after "the plaintiff class [was] recertified" would "the trial proceed as a Title VII pattern and practice suit" (*id.* at 1562). No published decision has turned on the Eleventh Circuit's dictum (*id.* at 1559) suggesting that a presumption of discrimination under *Teamsters* (see 431 U.S. at 357-361) might apply regardless of class certification.[7] If a future court

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[7] No "pattern or practice" was proved in *Forehand* v. *Florida State Hospital*, 839 F. Supp. 807, 813 (N.D. Fla. 1993), aff'd in part and

of appeals applies the Eleventh Circuit's "thought" (Pet. 21), there may be a "real" conflict between circuits (Pet. 22); there is none now.

Petitioners' true motivation in asking this Court to review this issue is their hope to evade their burden of proof by gaining the benefit of the presumption of discrimination that was imposed in *Teamsters*. See Pet. 18. Even the district court did not go so far as to relieve petitioners from their burden of proving that intentional discrimination had occurred in the real world, not merely in the secret statistical computations of their experts. As the Fourth Circuit observed, this "Court has never indicated that an inference of discrimination should arise in an individual case until the plaintiff has proved *all* elements of a *prima facie* case. See *McDonnell Douglas*, 411 U.S. at 802." Pet. App. 30a.

Not surprisingly, petitioners cannot identify a single decision by a court of appeals that adopts their proposed reversal of the burdens. To the contrary, as the Fourth Circuit recognized, in the rare instances when this issue has been broached even obliquely, "[t]he relevant case law on the subject" in other courts of appeals "supports [the] conclusion" reached below. Pet. App. 31a (citing decisions from the Fifth and Seventh Circuits).

Indeed, few employment discrimination cases could be less well suited to application of the *Teamsters* presumption than this one. The presumption is designed to address the situation in which a practice of an employer operates to produce fairly consistently discriminatory outcomes. Here, there is no identifiable "practice," much less any causal relationship between practice and outcome; moreover, the record of this case, in contrast to cases like *Teamsters*, shows at most a rare incidence of discriminatory promotion decisions within Circuit City's framework of decentralized decision-making. Only by traveling

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rev'd in part, 89 F.3d 1562 (11th Cir. 1996). See Pet. 22.

through the looking glass could one suppose that these circumstances rationally justify use of a presumption of discrimination: a facility where African-Americans, overall, have received almost exactly the proportion of promotions that their numbers in the full-time workforce would suggest, and where the proportion of African-Americans in every EEO category, including managerial positions, *exceeds* the proportion in the relevant labor pool.[8]

D. Finally, there is no merit to petitioners' suggestion (Pet. 17) that the Fourth Circuit "elevated form over substance" in holding that the decertification decision precluded the *Teamsters* presumption. Petitioners' eagerness to avoid shouldering their burden of proof is understandable in light of their dismal success rate: their 46 claims of discrimination, tested by normal legal standards, were found wanting 43 times. Petitioners' largely flimsy individual complaints may have driven them to put on still flimsier "pattern or practice" evidence. Although petitioners now try to muddy the waters (Pet. 17), the district court made unmistakably clear as the trial began that the case was "no longer a class action," but rather was "a case involving six individual plaintiffs" in which "pattern or practice" evidence would be admitted *only* to show that individual plaintiffs "were discriminated against in their specific instances." C.A. App. 2042-2043; see Pet. App. 16a. The district court also made clear that, "[w]hen all is said and done, * * * the focus" of the evidence and "the jury's inquiry is whether each individual employment decision was motivated by intentional racial discrimination." Pet. App. 110a. Later at trial, petitioners

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[8] In addition, as already noted, petitioners failed to show that discrimination in promotions occurred in 43 of the 46 instances that they hand-picked over a 30 month period for inclusion in this suit — presumably the strongest cases found among Circuit City's workforce of 1,500 African-American employees. Thus, petitioners proved no "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Teamsters*, 431 U.S. at 336.

expressly acknowledged that "this [wa]s not a class action." Tr. 1563.

Petitioners themselves invited whatever confusion resulted from their effort to distort procedural and substantive law when they tried to manufacture a "pattern or practice" of discrimination by aggregating dozens of weak and wholly separate individual promotion claims. Nothing remotely worthy of certiorari arises from the Fourth Circuit's fact-bound determination that the proof in this case did not justify the "sweeping" and "burdensome" remedies imposed by the district court. Pet. App. 41a.

III. THE FOURTH CIRCUIT CORRECTLY HELD THAT PETITIONERS' STATISTICAL EVIDENCE DID NOT RAISE A TRIABLE ISSUE OF PRETEXT

Contrary to petitioners' suggestion, there is nothing amiss in the Fourth Circuit's fact-bound determination that petitioners' statistical study did not by itself suffice to prove that Circuit City's proffered reasons for particular individual promotion decisions were pretextual. Pet. App. 35a-36a. The Fourth Circuit correctly observed that the study did not "adequately control for" several "factors" — not just "one," as petitioners would have it (Pet. i) — "other than race that could account for the disparity in promotions." Pet. App. 35a. The court of appeals focused on the study's "notable omission" of any factor accounting for the effect that "educational level had on promotions at Circuit City." *Ibid.* As the court observed, "the record is clear — and common sense dictates — that for many positions" among the dozens examined by the study "educational background was crucial." *Ibid.*[9] The study's many

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[9] This was not a merely "potential" problem (Pet. i); rather, there was "a large disparity in the educational levels of employees." Pet. App. 35a-36a. While 55% of all headquarters employees had college degrees, only 33% of the African-American employees were college graduates. *Id.* at 35a. At FNANB, education levels were in fact a specific consideration in promotion decisions. *Id.* at 12a; C.A. App.

other shortcomings included its failure to control for "factors" such as candidates' job title, their performance record, and (for those hired after April 1992) their tenure with Circuit City. See C.A. App. 1015, 2594-2596, 2608-2609. Because Circuit City hired increasing numbers of African-Americans during this period, the average African-American had less time in her position than others in her promotion pool. See *id.* at 2595.

Petitioners do not claim that the Fourth Circuit's disposition of this issue conflicts with the holding of any other court of appeals. Indeed, the Eighth Circuit has observed that even *valid* "[c]ompany-wide statistics are usually not helpful in establishing pretext in an employment-discrimination case, because those who make employment decisions vary across divisions." *Carman* v. *McDonnell Douglas Corp.*, 114 F.3d 790, 792 (8th Cir. 1997) (Richard Arnold, C.J.).

Moreover, contrary to petitioner's claim, the Fourth Circuit's conclusion that such blatant shortcomings "weaken[ed] the statistical study's probativeness" is entirely consistent with *Bazemore* v. *Friday*, 478 U.S. 385 (1986). First, *Bazemore* addressed admissibility, not independent sufficiency to prove a particular element of particular plaintiffs' case (see *id.* at 400); the Court recognized, however, that "some regressions" may be "so incomplete as to be inadmissible as irrelevant" (*id.* at 400 n.10). Second, the *Bazemore* study *did* measure education, tenure, and job title. *Id.* at 399. Because the study accounted for these "major factors" (*id.* at 400), it was admissible even though it did not account for "*all* measurable variables thought to have an effect on salary level." *Id.* at 399. By contrast, petitioners' study did not adequately account for *any* of the "major factors" identified in *Bazemore*. The Fourth Circuit's conclusion that such gross deficiencies fatally

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1850-1851. Ironically, the primary evidence urged by petitioner Lowery in support of her successful claim of discrimination was that she had better educational credentials than the woman who received the promotion at issue. See Pet. App. 10a.

"weaken[ed] the statistical study's probativeness" (Pet. App. 36a) accords with the holding in *Bazemore* that failure to include even *minor* variables "will affect the analysis' probativeness." 478 U.S. at 400. See also, *e.g.*, *Valentino* v. *United States Postal Service*, 674 F.2d 56, 68-71 (D.C. Cir. 1982) (Ruth Bader Ginsburg, J.) (rejecting deficient regression study).

At bottom, petitioners ask this Court to grant review to address what they claim is the Fourth Circuit's "misunderstanding of the record." Pet. 25. As it happens, the Fourth Circuit, if anything, understated the shortcomings of petitioners' efforts at statistical legerdemain.[10] In any event, petitioners' fact-bound disputes with the Fourth Circuit's assessment of the evidence are of no broader significance, and present no issue for this Court's review.

IV. THE FINALITY OF THE FOURTH CIRCUIT'S CORRECT DISPOSITION OF THE PUNITIVE DAMAGES CLAIM SHOULD NOT BE DELAYED

In a last-ditch effort to forestall the final disposition of this case, petitioners ask the Court to review the Fourth Circuit's reversal of the award of punitive damages. Petitioners say that this last issue warrants review in light of the grant of certiorari

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[10] Petitioners' statistics (and their expert's conclusion) were fishy, to say the least, in light of the undisputed showing that the proportion of promotions going to African-Americans approximated their proportion in the work force, while the proportion of management positions held by African-Americans exceeded the proportion in the relevant labor pool. See pp. 2-3, *supra*. To conjure up racial discrimination, petitioners' study assumed that every employee was eligible for every promotion throughout the hundred departments at headquarters, purporting to use multiple regressions to filter out every factor unrelated to race but entirely failing to control for the most obvious factors. C.A. App. 2589-2590, 2598-2599, 2947. Petitioners' effort to paper over these shortcomings (Pet. 24-25) improperly and misleadingly relies on voir dire material that was not admitted into evidence.

in *Kolstad* v. *American Dental Ass'n*, No. 98-208. In *Kolstad*, this Court will determine what circumstances justify an award of punitive damages under Title VII, which authorizes punitive damages upon proof that the defendant "engaged in a discriminatory practice * * * with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). Because that explicit statutory standard largely codifies the common-law standard for awarding punitive damages under 42 U.S.C. § 1981, see, *e.g.*, Pet. App. 39a, the decision in *Kolstad* will guide the courts of appeals in applying the standard for punitive damages under Section 1981 as well. Contrary to petitioners' suggestion, once *Kolstad* has been decided there will be no reason to revisit the similar issue in this case.

There also is no sound reason to delay disposing of the present petition. If this Court affirms the *en banc* D.C. Circuit in *Kolstad*, the ruling below on punitive damages plainly would be valid. Under any plausible resolution of *Kolstad*, however, petitioners here would not be entitled to punitive damages. The only rule of law under which petitioners suggest that the decision below could be undermined, and punitive damages reinstated, is if "evidence of intentional discrimination sufficient to raise a jury question on liability and compensatory damages is also *necessarily sufficient* to get the issue of punitive damages to the jury." Pet. 29 (emphasis added). Petitioners identify no other basis for finding malice or reckless indifference, and the Fourth Circuit evidently could perceive none.

But not even the petitioner in *Kolstad* advances so radical a position. To the contrary, the *Kolstad* petitioner recognizes that "not every case of intentional discrimination will involve reckless indifference." No. 98-208, Pet. Br. 43. The government agrees: "[A] finding of intentional discrimination, without more, does not automatically make a plaintiff eligible to receive punitive damages." No. 98-208, U.S. & EEOC Br. 10.[11]

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[11] The government recognized that, in the Fourth Circuit, as else-

Because *Kolstad* will not turn on whether every case of intentional discrimination supports an award of punitive damages, it will not impair the validity of the judgment below.

Moreover, the Fourth Circuit's use of the term "particularly egregious," relied on by petitioners (Pet. 28), is in context no more than shorthand for a showing of "malice or reckless indifference." See Pet. App. 39a. The "malice or reckless indifference" standard itself reflects a higher standard of culpability than is necessary to impose liability for compensatory damages alone under the *McDonnell Douglas* scheme of shifting presumptions. Indeed, this Court has recognized in the civil rights context that punitive damages are intended to punish and deter only "extreme conduct." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981); see *id.* at 267 n.29 (reserving punitive damages under 42 U.S.C. § 1983 for an "outrageous abuse of constitutional rights"). The Court has explained further that the punitive damages inquiry should "focus * * * on the *character of the tortfeasor's conduct* — whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards." *Smith* v. *Wade*, 461 U.S. 30, 54 (1983) (emphasis added).

Such distinctions are particularly apt in the context of the discrimination laws, where a finding of discrimination may rest on the generous presumptions of the *McDonnell Douglas* framework. The conduct underlying the imposition of punitive damages on Circuit City was its failure to promote Lowery to a position as supervisor and Peterson twice to the same FNANB assistant supervisor position. Except for whatever may be gleaned from the conduct itself, there is nothing in the record sufficient to prove malice or reckless indifference relating to

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where, "demonstrating egregiousness is only one of many available means of proving that the standard set by Congress for punitive damages liability has been satisfied." No. 98-208, U.S. & EEOC Br. 11 & n.8 (citing *Harris* v. *L&L Wings, Inc.*, 132 F.3d 978, 983 (4th Cir. 1997)). There simply was nothing else to go on here.

those promotions. Rather, liability appears to rest on the jury's second-guessing the relative qualifications of the two petitioners and the women promoted instead, despite petitioners' "problems that, at least partially, led to their being passed up for promotion." Pet. App. 40a. In fact, the jury sustained Circuit City's promotion choices against two of Lowery's three challenges, and against eight of Peterson's ten attacks. Even if liability may hang by so slender a thread under *McDonnell Douglas*, the Fourth Circuit surely was correct that such second-guessing was not an "appropriate" basis for "submit[ting] the issue of punitive damages to the jury." *Ibid.* This case is a poor vehicle for drawing fine lines on the topic, especially because the common law principles governing punitive damage awards under Section 1981 reflect a threshold for punishment that, if at all different, is higher than the standard spelled out in Section 1981a.

The punitive damages award in this case was unsound for another reason — one that makes this case still less appropriate for further review or delay. The district court instructed the jury that "[c]ivil rights laws are difficult to enforce without the threat to defendants of liability for punitive damages." C.A. App. 3121. That charge effectively directed a verdict of punitive liability upon any finding of discrimination by suggesting that the jury otherwise would undermine the civil rights laws.

Because the punitive damages awards are not sustainable under any plausible standard, the grant of certiorari in *Kolstad* provides no basis for delaying final disposition of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 98-972

IN THE

Supreme Court of the United States

October Term, 1998

RENEE LOWERY, *et al.*,

Petitioners,

v.

CIRCUIT CITY STORES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

Circuit City's Brief in Opposition ("Opp.") opens with a totally false statement: "Petitioners could not prove that widespread intentional race discrimination in promotions in fact had occurred [at Circuit City headquarters.]" Opp. at 1. Petitioners not only could but did prove precisely that fact to the satisfaction of a unanimous jury in Circuit City's own back yard in Richmond. The trial court similarly found that the "totality" of Circuit City's excessively subjective promotion practices had a significant disparate impact on African Americans. Memorandum and Order of Dec. 3, 1996, at 4. The verdict and finding were based on substantial evidence that Circuit City's all-white senior managers, who openly expressed disdain for the abilities and qualifications of African Americans, implemented a system of excessively subjective procedures that prevented black employees from

being promoted to management or supervisory positions at headquarters, and buried internal reports of the discriminatory results. The company's pattern or practice of discrimination was remarkably effective. In Circuit City's 50-year history, no African American had ever held a senior management position (until one was appointed to the Board of Directors two months prior to the trial), and only four African Americans had ever risen to the rank of manager, despite the claims of Circuit City witnesses that company policy is to train and promote from within. *See* Pet. at 23 n.14. The statistical analyses of both parties' experts confirmed that these stark demographics could not be explained by any factors other than race.[1]

The notion that petitioners spent $4 million in fees and expenses to gather and present all of this evidence at a month-long trial in order to avoid their burden of proving individual claims of discrimination under *McDonnell Douglas* (Opp. at 1, 12) is ludicrous. Petitioners assumed — and discharged —

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[1] Circuit City's own expert found an imbalance in promotions favoring whites in 75 percent of the departments at company headquarters (DX 683, Table 9a). When properly aggregated, the disparity exceeds four standard deviations, well above the level deemed by this Court to demonstrate statistical significance. PX 3986, pp. 6-7; *see Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977). In an effort to minimize the devastating statistics, Circuit City recycles irrelevant and misleading data presented at trial by its expert. Opp. at 2-3. For example, the contention that Circuit City hires more African Americans than the external labor pool would indicate says nothing about the company's discriminatory promotion practices, as its expert admitted. Tr. 3758-59. Circuit City no doubt hires minorities to fill its clerical positions and even occasionally promotes them within clerical positions. What it will not do is promote any of them into supervisory or management positions. The company's claim that blacks receive a substantial percentage of promotions is fundamentally flawed because its expert *excluded* from her analysis 40 percent of the promotions made during the relevant period — promotions that were made in salaried (*i.e.*, management) positions and that were therefore the most relevant promotions. Tr. 3697-3703. The jury gave such statistical sleight-of-hand exactly the weight it deserved.

a much more difficult burden: proving by a preponderance of the evidence that Circuit City's "standard operating procedure" was to discriminate systematically in promotions at corporate headquarters. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977). The Fourth Circuit did not conclude otherwise.

What the Fourth Circuit concluded was that neither the pattern-or-practice verdict nor the injunctive relief aimed at eliminating Circuit City's systemic discrimination could stand, solely because the district court had decertified the class action for management reasons despite the court's express statements that the class at all times met the requirements of Rule 23(a) and (b)(2). That ruling is a clear error of law, which, if not corrected, will effectively eliminate the expanded remedies under the Civil Rights Act of 1991 for victims of systemic employment discrimination. The court of appeals then compounded that error by precluding the district court from utilizing any alternative mechanism for trying pattern-or-practice claims. The Fourth Circuit's erroneous decision, as well as its related errors on matters for which it has previously been reversed by this Court, fully warrant plenary review.

ARGUMENT

1. Circuit City attempts to avoid review of the class certification issues by portraying the Fourth Circuit's decision as a fact-based determination with no broad implications for enforcement of the civil rights laws. Opp. at 10-11. In fact, this case was based on an erroneous legal ruling that squarely presents a significant legal issue — whether the class action remains a viable procedural tool to remedy pervasive discrimination in the workplace. The district court exercised its discretion to certify the class, and the propriety of that ruling was confirmed by the pattern-or-practice verdict. But the district court then committed legal error by decertifying the class in a misguided attempt to deal with case management concerns. Circuit City suggests that the class

was decertified here only because *this particular class* was unusually "cumbersome and inefficient." Opp. at 11. The same management and efficiency issues, however, will arise in every case where employees exercise their right under the Civil Rights Act of 1991 to have a jury decide their individual claims for compensatory and punitive damages as well as their classwide claims for injunctive relief. In every such case, the same problems will arise as to the proper procedures for trying the common pattern-or-practice issues and the individual damage claims. In every case, the question of bifurcation will arise and the court will have to decide whether the classwide liability issues and the individual claims may be decided by different juries. These issues are not unique to the present case.

The importance of the question, and the need for this Court's review, are confirmed by the Fifth Circuit's recent split decision in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), upon which Circuit City itself relies. Opp. at 13.[2] There, the panel majority held that the individual damage claims precluded class certification under Rule 23(b)(2) or 23(b)(3). The decision below, like *Allison*, thwarts effective enforcement of the civil rights laws by making class actions essentially unusable whenever the individual employees seek damages.

Review is further warranted because the Fourth Circuit improperly grafted onto Rule 23(b)(2) the superiority and manageability requirements that appear only in Rule 23(b)(3). Despite the court's disclaimer, it is quite clear from footnote 5 of the court's opinion (Pet. App. 24a) that the district courts in the Fourth Circuit are now authorized to consider

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[2] Circuit City also cites *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997). That case, however, is substantially different in that it deals with discrimination in accommodations, rather than employment, and did not involve the manageability concerns arising out of individual class members' claims for compensatory and punitive damages.

manageability and superiority in certifying and decertifying a (b)(2) class action. That result is contrary to the language and purpose of Rule 23(b)(2), which recognizes that class treatment of pattern-or-practice claims is inherently superior to other methods of adjudicating such claims. Moreover, the court of appeals acknowledged that it was weighing in on one side of a split in the circuits, citing *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1105 (5th Cir. 1993), as a conflicting authority. Pet. App. 23a. The court even quoted the portion of the *Forbush* opinion in which the Fifth Circuit held that "questions of manageability and judicial economy are ... irrelevant to 23(b)(2) class actions." Pet. App. 23a. This, of course, is just the opposite of the Fourth Circuit's holding in the present case.[3] The discord among the circuits should be resolved.

Finally, this case is an unusually good candidate for review because it presents the class certification issues so clearly and concretely. The issues are presented *clearly* because the district court held that the class action met all of the requirements of Rule 23 and was decertified *only* because the court could not devise what it considered a fair and efficient means of trying the class members' individual claims for compensatory and punitive damages. Pet. App. 66a. Thus, the case squarely raises the issue of how to deal with individual damage claims in an otherwise proper pattern-or-practice class action. The issues are presented *concretely* because, despite the decertification order, the case was tried in essence as a liability-stage class action and resulted in specific jury determinations that Circuit City did engage in a pattern or practice of intentional discrimination and that certain of the petitioners were entitled to recover compensatory and punitive damages. The case therefore provides a robust

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[3] Circuit City argues that the Fifth Circuit resolved the *Forbush* conflict in its later *Allison* opinion. Opp. at 15 n.4. In fact, the Fifth Circuit in *Allison* actually adhered to and reinforced *Forbush*. *See* 151 F.3d at 414 n.8.

factual and legal framework in which to decide how pattern-or-practice class actions may be tried when they involve individual damage claims in addition to systemic injunctive relief.

Circuit City attempts to avoid this outcome by arguing that the class never should have been certified in the first place. According to Circuit City, it never engaged in any standardized discriminatory practice sufficient to meet the commonality required of Rule 23. Opp. at 1, 4, 7, 12. The short answer is that the courts below and the jury rejected Circuit City's argument. This comes as no surprise, since this Court and others have frequently recognized that excessively subjective personnel practices like those employed by Circuit City at its headquarters can serve as the basis for classwide liability under the antidiscrimination laws. *See, e.g., Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988); *General Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982); *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993); *Green v. USX Corp.*, 843 F.2d 1511, 1533 (3d Cir. 1988); *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 333 (4th Cir. 1983). The Fourth Circuit itself long ago recognized that subjective employment criteria "are always suspect because of their capacity for masking racial bias." *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 550 (4th Cir. 1975). All of the class members were subjected to — and adversely affected by — the same personnel practices, which were fostered and encouraged by the same racial animus among Circuit City's upper management. The class was properly certified initially, and the jury properly found a pervasive pattern or practice of discrimination.[4]

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[4] Circuit City harps on the trial court's rejection of the majority of the individual claims as inconsistent with a finding of systemic discrimination. Opp. at 10, 19. In fact, the inconsistency is a result of both lower courts' erroneous application of the *McDonnell Douglas* standard of proof to a case in which the petitioners both alleged and proved a pattern of discriminatory decisionmaking, and thus should have been entitled to the *Teamsters* presumption with respect to their

2. Circuit City argues that the broad injunction entered by the district court was not necessary to remedy "three isolated instances of discrimination." Opp. at 16. The argument misses the point because the injunction was intended to remedy the pervasive pattern or practice of intentional discrimination that had been found to exist throughout Circuit City's headquarters. The Fourth Circuit's conclusion that, as a matter of law, the decertification of the class for management reasons precluded entry of injunctive relief to eliminate proven systemic discrimination is neither legally nor logically supportable, and exacerbates the harm caused by its ruling on class certification.

Contrary to Circuit City's argument (Opp. at 18-19), there is ample legal authority supporting the district court's injunctive decree. In similar circumstances, other courts have entered comparable systemic injunctions. Indeed, the injunction here was based in large part on those portions of the decree affirmed by the Fourth Circuit in *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625, 643-52 (4th Cir. 1978), *aff'g in part*, 16 FEP Cas. 1652 (E.D.N.C. 1976). *See also Local 28, Sheet Metal Workers Internat'l v. EEOC*, 478 U.S. 421, 481-82 (1986 (court-appointed administrator with broad powers to supervise union's compliance); *Brady v. Thurston Motor Lines*, 726 F.2d 136, 146-47 (4th Cir. 1984) (posting notices of job opportunities, survey black employees' job interests, detailed job descriptions, periodic reports of compliance); *Chisholm v. United States Postal Serv.*, 665 F.2d 482, 498-99 (4th Cir. 1981) (development of objective promotion criteria and creation of new EEO Employee Complaints Representative position). In short, the injunction entered in this case is not an aberration, but rather is typical of injunctions generally used to eliminate systemic discrimination. What is aberrational is the court of appeals'

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individual claims. *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 876 (1984).

refusal to allow the district court to remedy such systemic discrimination.

Nor was the injunction improper merely because the class was technically decertified for reasons unrelated to the requirements of Rule 23(a) and (b)(2). *See* Opp. at 19-20. The district court properly concluded that the jury could make a pattern-or-practice finding even in the absence of a certified class, and that finding by the jury clearly warranted the systemic injunctive relief. The district court held that the jury's pattern-or-practice finding was amply supported by the evidence. Pet. App. 67a-73a. The Fourth Circuit did not disturb the district court's holding. Rather, the court of appeals held as a matter of law that the pattern-or-practice finding could not stand in the absence of a formally certified class action. That holding is directly contrary to the Eleventh Circuit's decision in *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1559 (11th Cir. 1986). Circuit City dismisses *Cox* as a "passing thought" (Opp. at 19), but it is plainly an alternative holding by the Eleventh Circuit, as is evident from the text of the opinion itself. The conflict between this case and *Cox* is another reason for review by the Court.

3. Circuit City argues that the statistical issues should not be reviewed because they are merely "fact-bound disputes with the Fourth Circuit's assessment of the evidence." Opp. at 24. On the contrary, review is appropriate where a court of appeals persistently invades the province of the fact-finder by reweighing the evidence. *See Anderson v. Bessemer City*, 470 U.S. 564 (1985). And review here is all the more appropriate because the court of appeals made the very same error for which it was previously reversed in *Bazemore v. Friday*, 478 U.S. 385 (1986). In this case, the court of appeals invalidated petitioners' statistical evidence because it erroneously thought a *single* variable — educational level — had been omitted from the regression analyses and surmised (without any basis for doing so) that such a variable would explain the gross disparities in black and white promotion rates. Pet. App. 36a. Under *Bazemore*, such an omission would go to the weight,

not the admissibility, of the evidence. As petitioners previously demonstrated (Pet. 24-25), educational level was in fact considered by both experts and found to be statistically insignificant. Even if that factor had been totally omitted, however, the court of appeals' decision would still be erroneous and a patent violation of the *Bazemore* rule.

4. Circuit City does not dispute that this case presents substantially the same issue as *Kolstad v. American Dental Ass'n*, No. 98-208. Opp. at 25. Taking a "heads-I-win-tails-you-lose" approach, Circuit City argues that it should prevail on this issue regardless of which way the Court decides *Kolstad*. The argument is illogical at best.

The split in the circuits is undisputed. Some courts, like the Fourth Circuit here and the District of Columbia Circuit in *Kolstad*, hold that proof of intentional discrimination alone is not sufficient to permit the jury to award punitive damages. Rather, there must also be evidence of some additional "particularly egregious conduct" to warrant punitive damages. Pet. App. 39a. Other courts hold that proof of intentional discrimination sufficient for compensatory damages is also sufficient to permit the jury to consider — under appropriate instructions — whether punitive damages should be awarded. *See, e.g., Luciano v. Olsten Corp.*, 110 F.3d 210, 219-20 (2d Cir. 1997); *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995) (§ 1981 cases); *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987).[5] In the present case, the Fourth Circuit found that there was sufficient evidence of intentional discrimination and therefore affirmed the compensatory damage awards. The Fourth Circuit also rejected Circuit City's challenge to the jury instructions regarding punitive damages. Yet, despite proper instructions and the jury's finding of systemic as well as specific individual discrimination, the court did not think that there was

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[5] Petitioners believe that this rule is more faithful to *Smith v. Wade*, 461 U.S. 30 (1983), than the *Kolstad* rule.

"particularly egregious conduct" to permit the jury even to consider an award of punitive damages.

The *Kolstad* issue is thus squarely presented. If, as petitioners believe, the *Kolstad* rule is wrong, then the evidence in this case was necessarily sufficient to allow the jury to consider punitive damages, and the court of appeals had no legal basis to interfere with the verdict. In that event, the punitive damage verdict would have to be reinstated. At a minimum, the case would have to be remanded for reconsideration in light of the correct legal standard. An additional factor favoring review is that this case presents the punitive damage issue under 42 U.S.C. § 1981, while *Kolstad* presents it under Title VII. Deciding both cases would allow the Court to harmonize the treatment of punitive damages under the two statutes.

CONCLUSION

For all the foregoing reasons, petitioners submit that the petition for a writ of certiorari should be granted.

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